

REDACTED BY ORDER OF THE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

1	PACKET INTELLIGENCE LLC) (CIVIL DOCKET NO.
2) (
3) (2:16-CV-230-JRG
4) (
5) (
6	VS.) (MARSHALL, TEXAS
7) (
8	NETSCOUT SYSTEMS, INC.) (
9	TEKTRONIX COMMUNICATIONS,) (OCTOBER 11, 2017
10	AND TEKTRONIX TEXAS LLC) (8:40 A.M.

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

UNITED STATES DISTRICT JUDGE

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(Proceedings recorded by mechanical stenography,
transcript produced on CAT system.)

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P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

All right. Counsel, I've been advised by the parties that with regard to Mr. Maixner and his testimony concerning the issue before the Court of inequitable conduct, the parties have agreed that he should be released, and his testimony with regard to inequitable conduct by agreement will be submitted in the form of deposition excerpts to be provided to the Court outside the presence of the jury.

The same agreement does not apply with regard to Mr. Dietz, and Mr. Dietz remains in attendance and has not been released.

Is that the parties' agreement?

MR. DAVIS: Yes, Your Honor.

MR. KRAEUTLER: Yes, Your Honor.

THE COURT: Okay. Then Mr. Maixner is released and is free to stay, he's also free to leave. Mr. Dietz remains with the Court until he's released at a later time.

All right. Are the -- are the parties prepared to read into the record the items from the list of pre-admitted exhibits used during yesterday's portion

1 of the trial before the jury?

2 MR. DAVIS: We are, Your Honor.

3 THE COURT: Let's proceed to do that.

4 MR. HARTSELL: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. HARTSELL: Our list are Plaintiff's
7 Exhibit Nos. 3, 7, 9, 163, 166, 168, 169, 170, 173, 185,
8 186, 189, 190, 191, 198, 201, 202, 203, 210, 212, 213,
9 215, 223, 226, 228, 230, 234, 248, 267, 274, 278, 279,
10 280, 282, 301, 315, 320, 412, 413, and 414.

11 And from Defendants' Exhibits, Nos. 58,
12 89, 253, 475, 477, 517, 522, and 650.

13 THE COURT: Does Defendant concur in that
14 rendition?

15 MS. SMITH: I have one -- Your Honor, I
16 believe Defendants also introduced Defense Exhibit 266.
17 But otherwise, we're agreed.

18 THE COURT: All right. Plaintiff agree
19 with that addition?

20 MR. HARTSELL: Yes, Your Honor.

21 THE COURT: Okay. And it's my
22 understanding that the remaining deposition witnesses
23 Plaintiff had intended to call, they've elected at this
24 point not to call.

25 Who is Plaintiff's next witness?

1 MR. DAVIS: Mr. Bergman, Your Honor, our
2 damages expert.

3 THE COURT: All right. Let's bring in
4 the jury, Mr. Elliott.

5 COURT SECURITY OFFICER: All rise for the
6 jury.

7 (Jury in.)

8 THE COURT: Good morning, ladies and
9 gentlemen. Please be seated.

10 We'll now proceed with the Plaintiff's
11 next witness.

12 Plaintiff, call your next witness.

13 MR. DAVIS: Thank you, Your Honor.

14 Plaintiffs call Mr. Jim Bergman to the
15 stand.

16 THE COURT: If you'll come forward, Mr.
17 Bergman. And you've been previously sworn, correct?

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: Okay. Please have a seat.

20 Mr. Davis, you may proceed with your
21 direct examination when you're ready.

22 MR. DAVIS: Thank you, Your Honor.

23 JIM BERGMAN, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

24 DIRECT EXAMINATION

25 BY MR. DAVIS:

1 Q. Good morning, Mr. Bergman.

2 A. Good morning, Mr. Davis.

3 Q. Could you please introduce yourself to the
4 jury?

5 A. Good morning. My name is Jim Bergman.

6 Q. What do you do for a living, Mr. Bergman?

7 A. I'm an economist specializing in the valuation
8 of intellectual property such as patents and trade
9 secrets.

10 Q. And do you ever do this in the context of
11 litigation?

12 A. I do, yes.

13 Q. Are you married?

14 A. I am.

15 Q. Do you have any children?

16 A. I have two children. I have a 15-year-old
17 daughter and a 10-year-old son.

18 Q. And did Packet Intelligence contact you about
19 this case?

20 A. Yes, they did.

21 Q. And why did they contact you?

22 A. They asked me to perform an investigation to
23 determine the amount that Packet Intelligence would be
24 due if NetScout was found to infringe the
25 patents-in-suit.

1 Q. Now, before Packet Intelligence contacted you,
2 had you ever heard of Packet Intelligence?

3 A. I had not.

4 Q. Did you know any of the lawyers in this case?

5 A. I did not.

6 Q. Did you know Mr. Brunell or Mr. Vachon?

7 A. No, sir.

8 Q. Had you ever heard of the patents or any of
9 the inventors on the patents in this case?

10 A. No, sir.

11 Q. How are you being compensated for your time
12 and the work that you've done for this case?

13 A. I'm being compensated on an hourly basis.

14 Q. And does your compensation in any way depend
15 on the outcome of this case or the opinions you gave?

16 A. No, sir.

17 Q. What is your hourly rate?

18 A. \$580 an hour.

19 Q. Now, prior to PI retaining you -- retaining
20 you for your services in this case -- well, we've
21 already established, you -- you didn't know anybody
22 involved in this case prior to coming here, right?

23 A. That's correct.

24 Q. Okay. Now, did you prepare a set of slides to
25 help you with your testimony today?

1 A. I did.

2 Q. And before we discuss your opinions, can you
3 tell us a little bit about your employment background?

4 A. Yes. I am currently the founder and president
5 of Bergman Consulting which is a firm that I started
6 earlier this year.

7 Prior to that, I was the former head of the
8 intellectual property group and a managing director at
9 Conway MacKenzie which is a global financial consulting
10 firm.

11 Prior to that, I spent 10 years as an in-house
12 economist for various national and global law firms,
13 including McKool Smith.

14 And prior to that, I spent 10 years in
15 information technology primarily as a network engineer.

16 Q. Now, you -- you said you worked for McKool
17 Smith. Is that a law firm?

18 A. Yes, sir.

19 Q. So you have worked in-house for some law
20 firms?

21 A. That's correct.

22 Q. And what did you do working in-house for some
23 law firms?

24 A. I mostly provided economic analysis on
25 intellectual property, complex litigation cases.

1 Q. Would you describe your qualifications that
2 you believe suit you to render an opinion in this case?

3 A. Yes, I have a Bachelor's of arts in economics
4 from the University of the California in Irvine. I also
5 have a Master's in business administration from the
6 University of California at Irvine. And I'm currently
7 in the process of pursuing a Master's in computer
8 science from Georgia Tech.

9 Q. Do you hold any professional designations?

10 A. Yes. I'm also a certified financial analyst,
11 which is a certification that requires four years of
12 experience and 18 hours of testing on economics,
13 accounting, finance, and asset valuation.

14 Q. And what about professional organizations, are
15 you members of any of those?

16 A. Yeah, I'm a member of a few organizations.
17 The one that's probably most relevant is the Licensing
18 Executives Society.

19 Q. What is the Licensing Executive Society?

20 A. They're an organization made up of
21 professionals that focus on licensing intellectual
22 property.

23 Q. How many years have you worked as an economist
24 analyzing and valuing business transactions with a focus
25 on intellectual property?

1 A. It's been about 13 years now.

2 Q. And in your more than 13 years of experience,
3 about how many would -- I guess valuations or
4 transactions would you say that you've been involved in?

5 A. Similar to this, at least 50.

6 Q. I'm sorry, what?

7 A. At least 50.

8 Q. And how many -- how many patent licensing --
9 patent licenses would you say that you've evaluated in
10 the context of those projects?

11 A. Several hundred.

12 Q. And how are your education and your work
13 experience relevant to your testimony today?

14 A. With the type of investigation that I
15 performed in this case, it requires a knowledge of
16 economics, accounting, statistics, and finance. And my
17 overall experience in working on cases like this has
18 helped guide me in an understanding of the methodologies
19 necessary to perform this type of investigation.

20 Q. Now, you've -- you've done this a lot in -- in
21 various litigations. Do you typically work more for the
22 Plaintiffs or the Defendants in your valuations?

23 A. I've done work on both sides, but to date,
24 most of the work has been for Plaintiffs.

25 Q. And if you had to break that into a

1 percentage, what would you just roughly estimate that
2 percentage to be?

3 A. In the work that I've provided testimony on,
4 it's about 75 percent Plaintiff, 25 percent defense.

5 Q. Okay. Have you ever testified in U.S.
6 District Court before?

7 A. Yes.

8 Q. What information did you review as part of
9 your investigation and as part of the assignment that
10 you had in this case?

11 A. I looked at a lot of information in this case
12 in performing my investigation, including NetScout's own
13 internal documents, the patents, Court filings,
14 deposition testimony of NetScout and Packet Intelligence
15 employees, financial information, industry research,
16 various licensing agreements, and the expert reports in
17 this case.

18 Q. How many documents have you reviewed in this
19 case?

20 A. Many thousands.

21 Q. How much total time have you spent reviewing
22 the materials, preparing your report, and preparing to
23 come in here and present your opinions to the jury?

24 A. I'd say probably 350 hours.

25 Q. I'm sorry?

1 A. Probably 350 hours.

2 Q. If you don't mind, would you pull that
3 microphone close? Thank you.

4 A. Sure.

5 Q. And of those 350 hours, how much of that time
6 did you personally spend working on this case?

7 A. I did have some people working under my
8 direction help me on the case, but probably 90 percent
9 of that time is my time.

10 Q. How does -- how does the analysis that you
11 performed in this case compare to the analysis that you
12 would typically perform when you are determining patent
13 infringement damages in a lawsuit?

14 A. I follow the same methodology that I typically
15 follow.

16 Q. What is your overall opinion in this case with
17 regard to damages for patent infringement?

18 A. So I applied two separate methodologies in my
19 determination of reasonable royalty damages in this
20 case. I -- the first approach which we'll talk about is
21 the income approach. And based on that approach, I came
22 to a reasonable royalty in this case of \$15.6 million
23 from the point of first infringement effectively to
24 today.

25 And using the market approach, which is a

1 completely separate approach, I determined that a
2 reasonable royalty would be \$14.3 million, similarly
3 from the beginning of infringement to today.

4 Q. Now, you mentioned in -- when you were
5 describing both of those approaches that you performed
6 your analysis from the beginning of infringement to
7 today. Why did you add that qualification?

8 A. Because the investigation that I was asked to
9 perform is really to determine a reasonable royalty for
10 infringement. So the analysis would begin at the
11 beginning of infringement up until the date we know that
12 they're continuing to infringe.

13 Q. Do these valuations apply to any infringement
14 on a going forward basis?

15 A. They do not.

16 Q. Or let me say that a little differently. Do
17 they account for any future infringement of the patents?

18 A. They don't account for any future
19 infringement.

20 Q. So this is just from beginning of infringement
21 until today, this is your opinion as to the amount of
22 damages for infringement?

23 A. That's correct.

24 Q. Now, of these two approaches that you
25 provided, which do you believe is the most appropriate

1 methodology for the jury to rely on?

2 A. I believe that both are -- are reasonable in
3 the context of this case. The income approach is the
4 only approach that actually looks at the -- the revenue
5 and profit that's directly attributable to these
6 patents.

7 Q. Why did you apply two approaches?

8 A. Because as part of the analysis in performing
9 a valuation, you want to attempt to sort of tackle this
10 problem from multiple angles. The income approach is
11 one way to look at things. The market approach is a
12 completely separate analysis.

13 So by performing two separate methodologies,
14 you can get comfort that the -- that each analysis is --
15 is appropriate and reasonable.

16 Q. If you could put these two approaches in a
17 little context for us, what is the -- do you have any
18 analogies that -- that might apply to these various
19 approaches?

20 A. Yes. So probably the -- maybe the best
21 example is -- is if you're attempting to -- to value a
22 small business, for example, you can do this in a couple
23 of different ways.

24 What the income approach for valuation says is
25 can I look at the revenue and profitability that that

1 small business has generated, look at that over time,
2 and determine the value of that company simply based on
3 its cash flows, simply based on the revenue and
4 profitability.

5 The market approach is a completely different
6 angle to that where it says can I find other small
7 businesses out in the marketplace that do something
8 similar to what this company does, and if there is a
9 known value for that business, to take that value and
10 then to adjust it based on the individual facts and
11 circumstances of the business you're trying to value?

12 So using a comparable transaction or
13 comparable company in the market versus solely looking
14 at the company itself and the cash flows generated from
15 that company. Those are the -- that's the example of
16 the two approaches.

17 Q. How many claims are at issue in this case?

18 A. It's my understanding that there are six
19 claims, two from each patent.

20 Q. And does your opinion on damages change
21 depending on whether the jury finds that one of the six
22 claims is infringed or all six?

23 A. My opinion doesn't change dependent upon which
24 claims are found to infringe.

25 Q. Why does your opinion not change if less than

1 all six claims are infringed?

2 A. It's my understanding from discussions with
3 Dr. Almeroth that the -- the value attributable to each
4 individual claim covers the NetScout's infringement, so
5 it would be -- it's unnecessary to make any adjustments.

6 Q. And the slide that you've got on the screen
7 here, these are the asserted -- asserted claims of the
8 patents?

9 A. Yes, sir.

10 Q. What is the law on patent damages?

11 A. The law on patent damages states that a
12 Plaintiff is due damages on -- upon a finding of
13 infringement. A Plaintiff is due damages adequate to
14 compensate for that infringement but in no event less
15 than a reasonable royalty for the use made of the
16 invention by the infringer.

17 Q. What is a reasonable royalty?

18 A. A reasonable royalty is a royalty that would
19 be due based, as it states here, for the use made of the
20 invention by the infringer. So -- so you're not only
21 looking at simply the value of the patent in isolation.
22 You're looking at the value of the patent to the
23 infringer.

24 Q. Can you give us an example of a royalty?

25 A. I think Mr. Brunell in his testimony yesterday

1 gave the example of oil. If you're a landowner and a
2 company comes to you and says we want to pay you to take
3 oil off your land or mineral rights, that payment is a
4 royalty.

5 Q. Is Packet Intelligence entitled to a
6 reasonable royalty in this case if the jury finds
7 infringement?

8 A. Yes, sir.

9 Q. Now, in a reasonable royalty calculation, is
10 the royalty required to be calculated down to the penny?

11 A. No.

12 Q. Why not?

13 A. The ultimate royalty at the end of the day
14 needs to be a reasonable royalty. And part of the
15 challenge in -- challenges in cases like this is not
16 only are you -- or am I in my investigation attempting
17 to value a unique asset, this asset doesn't exist
18 anywhere else in the world, I am attempting to perform
19 that valuation for a particular company. So that adds
20 an extra layer of complication.

21 So some -- ultimately some estimation is
22 required in determining the value of this unique asset
23 for this particular company.

24 I would say that -- that not even NetScout has
25 attempted to value this functionality itself within its

1 own system. It doesn't do that as part of its normal
2 operation. So nobody other than the two experts in this
3 case has probably ever attempted to value this patent,
4 this technology for this company.

5 Q. Now, I see on the slide here you've
6 highlighted -- you've highlighted, you've bolded
7 reasonable royalty language, but you've also underlined
8 a portion of -- of that phrase. Why have you done that?

9 A. Because I think it's a key part of the --
10 of -- of ultimately of damages, which is I'm not just
11 attempting to determine the value of this patent in the
12 marketplace. I'm attempting to determine the amount of
13 use that NetScout -- or the amount of benefit that
14 NetScout has achieved from its use of the patent and
15 determine a reasonable royalty based on that use.

16 Q. What is the framework that you used to perform
17 this reasonable royalty analysis?

18 A. The framework that's set up for reasonable
19 royalty damages is something called the hypothetical
20 negotiation.

21 Q. What is a hypothetical negotiation?

22 A. A hypothetical negotiation sort of imagines
23 that the infringer and a patentholder would have gotten
24 together -- would have sat in a room prior to the date
25 of first infringement and would have come to an

1 agreement as to what a reasonable royalty would have
2 been for use of the patented technology.

3 MR. DAVIS: All right. And before I move
4 on, I've just been reminded, Your Honor, I -- I forgot
5 to tender Mr. Bergman, so at this time I'd like to
6 tender Mr. Bergman as an expert in economics and the
7 valuation of patent damages.

8 THE COURT: Is there objection?

9 MR. CARR: No objection, Your Honor.

10 THE COURT: Then the Court will recognize
11 the witness as an expert in those designated fields.
12 Continue, Counsel.

13 MR. DAVIS: Thank you, Your Honor.

14 Q. (By Mr. Davis) So you just described the
15 hypothetical negotiation. How is a hypothetical
16 negotiation that you've laid out here different from the
17 real world or a real-world notion?

18 A. There are probably three key differences
19 between what you would imagine a real-world negotiation
20 would be and the -- and the context of determining
21 real -- reasonable royalty damages using a hypothetical
22 negotiation.

23 The first distinction is that in this
24 hypothetical negotiation, the parties agree that the
25 patents are valid and infringed. And then as you would

1 imagine in a real-world negotiation, validity and
2 infringement are contested and frequently hotly
3 contested. So there's a big difference there between
4 the hypothetical negotiation and the real-world.

5 The second one is that in the hypothetical
6 negotiation, both parties are assumed to have all
7 knowledge about all relevant facts, not only the
8 relevant facts as of that negotiation, but even the
9 relevant facts going into the future.

10 Where -- whereas in a real-world negotiation,
11 parties frequently don't have access to all the relevant
12 information. One party may be hiding relevant
13 information or want -- not want the other party to know
14 all the information in that negotiation.

15 And finally, in a hypothetical negotiation,
16 the parties have to agree. They have to come to some
17 kind of an agreement as to what a reasonable royalty
18 would be. In a real world, obviously, parties can just
19 get up and walk away from the table and say, I'm not
20 going to come to an agreement.

21 Q. And so in the hypothetical negotiation, can
22 NetScout say to Packet Intelligence as part of their
23 negotiating position, we don't think your patents are
24 infringed, and we don't think your patents are valid?

25 A. No, walking in the door, in this hypothetical

1 negotiation, both parties would have agreed that the
2 patents are valid and infringed.

3 Q. Now, you mentioned the book of wisdom. Can
4 you tell us what the importance of that is?

5 A. Yeah, the book of wisdom is what's been dis --
6 what's been called in the law the -- the ability for the
7 parties to kind of look into the future, to see how much
8 profitability has been received by the infringer as an
9 example.

10 Q. So you mentioned that the hypothetical
11 negotiation occurs when?

12 A. December of 2010.

13 Q. And so in December of 2010, at that time, had
14 NetScout made any money yet using the technology?

15 A. They had not.

16 Q. So what does the book of wisdom do with
17 respect to the amount of money that NetScout will make
18 over the few years, six or seven years on these products
19 or on this technology?

20 A. So we know based on NetScout's financials that
21 over the infringement period, they made 4 -- \$408.3
22 million. So as part of this hypothetical negotiation,
23 the parties, even though this negotiation is occurring
24 back in December of 2010, the parties would have been
25 aware of that 408.3 million-dollar revenue number and

1 all the profitability associated with that.

2 Q. So when Packet Intelligence sits down at the
3 table to negotiate with NetScout it gets to tell
4 NetScout, hey, I know that you will make \$400 million
5 using these -- using this technology?

6 A. Over that period of time, yes.

7 Q. Is the book of wisdom kind of like a crystal
8 ball that let's you see into the future?

9 A. Yeah, sort of.

10 Q. Okay. And so what does the -- what does the
11 hypothetical negotiation look like in this case?

12 A. In this case, as I said, you would imagine
13 that a -- an executive from Packet Intelligence, an
14 executive from NetScout would have sat around a table in
15 December of 2010 to negotiate the reasonable royalty for
16 NetScout's use of these patents.

17 Q. Now, in 2010, though, Packet Intelligence
18 didn't own the patents, right?

19 A. They did not.

20 Q. And so how does that work?

21 A. Again, using the book of wisdom, we know that
22 in 2010, Exar was actually the holder of these patents.
23 So we know that using the book of wisdom, that the
24 patents would have been sold to Packet Intelligence,
25 and, therefore, negotiating effectively on behalf of

1 Packet Intelligence.

2 Q. All right. We -- so we have the hypothetical
3 negotiation. What factors do you consider in
4 determining what the outcome of the hypothetical
5 negotiation would be in terms of a reasonable royalty?

6 A. So there are effectively 15 different
7 reasonable royalty factors that come into play that need
8 to be considered. And this comes from a particular case
9 that has sort of laid out these individual factors that
10 need to be considered as part of a reasonable royalty
11 analysis.

12 Q. Will the jury be instructed on these factors?

13 A. It's my understanding that Judge Gilstrap will
14 provide these factors in -- in the jury instructions.

15 Q. Now, there's a lot of factors here, but
16 briefly can you -- can you walk us through them or
17 explain them?

18 A. Yeah, so what -- what I typically do is I
19 will -- I break these factors into two buckets. And we
20 already discussed a little bit sort of this income
21 approach and market approach. But effectively these
22 factors can fall into either one or -- or both of the
23 individual approaches.

24 So my analysis takes those factors and looks
25 at them either when I perform my income-based approach

1 methodology or my market-based approach methodology.

2 Q. Are all of these factors equally important in
3 every case?

4 A. No. Some are not relevant to a case that --
5 that maybe would be relevant to another case.

6 Q. Now, one thing that -- that I know you've
7 done, there's -- there are reasonable -- but there are
8 different types of royalty payments. What are the
9 different types of royalty payments that you considered
10 might be agreed to in the hypothetical negotiation?

11 A. So there's two different types of royalties.
12 There's either a running royalty, which is a royalty
13 based on periodic payments based on actual sales. So if
14 we go back to the -- the example of a landowner getting
15 paid for the extraction of oil off their land, it could
16 be based on the number of barrels that are extracted.
17 So if you get, you know, \$20 per barrel, they extract a
18 thousand barrels, you'd get paid \$20,000.

19 The second type is a lump-sum payment, which
20 is just a single payment at the time the license is
21 executed. It could be for a small period of time, it
22 could be into perpetuity, it depends. But in that case,
23 to use the same example, a company would come to you and
24 say, I will pay you \$300,000 to extract as much oil as I
25 can off the land, and if there's nothing there, that's

1 my risk.

2 Q. And what type of royalty did you find or
3 conclude was appropriate in this case?

4 A. Based on the methodologies that I employed, I
5 found that those methodologies resulted in a running
6 royalty.

7 Q. So in a running royalty, what are the
8 components of a running royalty that comprise it?

9 A. So as we described, there are two basic
10 components to a running royalty. There is the royalty
11 base, which is the -- either total revenue or profit or
12 number of units. And then the royalty rate, which is
13 what portion of that would be applied to come to the
14 total amount of the reasonable royalty.

15 Q. Do you have an understanding of the technical
16 benefits of the -- provided by the patents-in-suit?

17 A. I do.

18 Q. And what is -- what sources of information do
19 you rely on to understand the technical benefits of
20 these patents?

21 A. Primarily with my discussions with Dr.
22 Almeroth.

23 Q. Okay. And could you tie the technical
24 benefits of the patents back to the patent statute?

25 A. Yeah. As -- you know, in the determination of

1 a reasonable royalty for the infringer's use of those
2 patents, the technical benefits are the benefits that
3 are being provided to the Defendant or provided to the
4 infringer. And based on that, we can determine a
5 reasonable royalty.

6 Q. Okay. And in the language of the statute, it
7 says: The value for the use. Is that what you mean by
8 the technical benefits?

9 A. Yes.

10 Q. And what are the technical benefits that the
11 patent -- that the patents provide and that NetScout has
12 used?

13 A. I think some of this was covered yesterday,
14 but specifically with regard to NetScout, it's my
15 understanding that the benefits provided by the patent
16 include increased traffic recognition rates, a greater
17 overall understanding of the traffic that's flowing
18 through the network, and increased quality of service
19 metrics.

20 Q. Now, did you hear Mr. Brunell's testimony
21 yesterday regarding forward citations?

22 A. I did.

23 Q. And what that meant to him? What do the
24 forward citations to these patents indicate to you?

25 A. They indicate that they're valuable.

1 Q. And what are the forward citations to the
2 asserted patents in this case?

3 A. Sorry. The -- for the '725 patent, that
4 patent has been cited 291 times. And -- and what's
5 interesting is when I issued my report, the patent had
6 been cited 280 --

7 MR. CARR: Objection, Your Honor.

8 THE COURT: What's your objection?

9 MR. CARR: May I -- may I approach?

10 THE COURT: Approach the bench.

11 (Bench conference.)

12 MR. CARR: I had agreed with Mr. Gasser
13 that there will not be a mention of Tektronix on this
14 slide or Fluke or Network General on the following
15 slides. Those were not in his report.

16 MR. GASSER: We apologize. There was a
17 glitch.

18 THE COURT: Just a minute. Y'all are
19 going to have to speak into the microphone.

20 MR. GASSER: We --

21 THE COURT: My understanding is there was
22 a dispute as to this demonstrative, and you all
23 negotiated a resolution of that dispute which was to
24 remove some of these logos and that that's the basis of
25 the objection, that some of the agreed upon removals

1 haven't taken place; is that right?

2 MR. GASSER: That is correct, Your Honor,
3 yes.

4 THE COURT: Okay. Well, we either need
5 to pull this down and move on or you need to put up the
6 right one and move on.

7 MR. GASSER: Okay. We can pull this one
8 down, and I can just -- I can verify -- she can just
9 load the correct version.

10 THE COURT: Get it pulled down --

11 MR. GASSER: Okay.

12 THE COURT: -- and y'all take a second to
13 talk to your tech person.

14 MR. GASSER: Okay.

15 THE COURT: And let opposing counsel know
16 whether you're going to put the right one up or you're
17 going to move on.

18 MR. GASSER: All right. Thank you.

19 MR. CARR: Thank you.

20 (Bench conference concluded.)

21 THE COURT: Do you need a moment to
22 consult with your technical assistant, Mr. Davis?

23 MR. DAVIS: Yes, Your Honor, if I may,
24 please.

25 THE COURT: Take a moment.

1 MR. DAVIS: I think we've got that worked
2 out, Your Honor.

3 THE COURT: All right. Let's proceed.

4 MR. DAVIS: Okay.

5 Q. (By Mr. Davis) I believe we're -- yes, here
6 we go. This is the correct slide.

7 You were saying, Dr. -- Mr. Bergman about
8 forward citations.

9 A. Yes. So looking at the '725 patent, that
10 patent has been cited 291 times as of -- effectively as
11 of today. When I issued my report back in June, the
12 patent had been cited 281 times. So just over the last
13 three or four months, it's been cited an additional 10
14 times. But it's been cited by obviously major companies
15 here like Intel, Cisco, Amazon.

16 Q. Now, are you aware that NetScout purchased a
17 company called Tektronix?

18 A. Yes, sir.

19 Q. Are you aware that they purchased a number of
20 companies together as part of an acquisition?

21 A. Yes.

22 Q. What -- what do you know about that
23 acquisition?

24 A. That was an acquisition that occurred in 2015
25 where NetScout acquired four companies from Danaher,

1 including Tektronix. The total purchase price was \$2.3
2 billion.

3 Q. And of the multiple companies purchased by
4 NetScout, together with Tektronix, what percentage of
5 the revenue did Tektronix have relevant to the entire
6 group of those companies that were purchased?

7 A. From the data that I saw as of 2014, the year
8 prior to that acquisition, Tektronix's revenue consisted
9 of 61 percent of the total revenue of that
10 2.3-billion-dollar acquisition.

11 Q. Okay. And --

12 THE COURT: You're going to -- just a
13 minute. You're going to need to speak up, Mr. Bergman.

14 THE WITNESS: Sorry.

15 THE COURT: Your voice seems to trail off
16 at the end of your sentences, so --

17 THE WITNESS: Okay.

18 THE COURT: -- please be mindful that
19 it's important for everyone to hear you.

20 THE WITNESS: Yes, sir.

21 THE COURT: Continue, Counsel.

22 MR. DAVIS: Thank you, Your Honor.

23 Q. (By Mr. Davis) And do you have a slide on
24 that?

25 A. I believe I do. Jump back here for a second.

1 There we go.

2 Q. Oh, okay.

3 A. There's a slide.

4 Q. Okay. Now, have you ever heard of a company
5 called Fluke Corporation?

6 A. Yes, I have.

7 Q. Who is Fluke?

8 A. Fluke is another company that was acquired
9 with those same four companies as part of the 2015
10 acquisition.

11 Q. Now, did you consider all of the information
12 we've just discussed -- been discussing based on forward
13 citations when you performed your valuation of the
14 reasonable royalty in this case?

15 A. Yes, it was part of my consideration.

16 Q. Okay. And how did you use that information?

17 A. Really just to get an understanding of the
18 overall value of the patents.

19 Q. What is the income approach that you used in
20 this case?

21 A. Let me get to my slide.

22 So the income approach, like we discussed, was
23 the -- the investigation that I performed was to
24 determine the amount of profitability that was directly
25 attributable to the patents-in-suit.

1 Q. Now, can you give the jury a high level
2 preview of the steps that you used to -- to apply the
3 income approach to this case?

4 A. Yeah. I took three separate steps. The first
5 was really just to get an understanding of the
6 incremental benefit provided by the patents over the
7 prior art.

8 The second step was to evaluate the accused
9 products based on that -- on the incremental benefit.

10 And the third step was to then go about
11 allocating the revenue and profit of the company to that
12 incremental benefit.

13 Q. Now, with respect to the first step, how did
14 you determine the incremental benefit provided by the
15 patents at issue in this case?

16 A. Well, when you perform these kind of
17 investigations, and specifically when you're attempting
18 to value a patent, what's important to do is to get an
19 understanding as to what -- what we call the next best
20 alternative to non-infringement.

21 Q. What do you mean by "next best alternative to
22 infringement"?

23 A. That basically means that in order to
24 determine the value of the patent, you have to figure
25 out what other alternatives are out in the marketplace

1 that provide other maybe similar functionality, not up
2 to the -- to what you get with the patent, and then
3 determine the benefit between those two -- between those
4 two options.

5 And -- and maybe a good example is to say that
6 if I've got a luggage company that has a -- that has a
7 patent on a four-wheel suitcase, all right, if I was
8 asked to determine what's the value of that patent, I
9 would have to look into the marketplace and say, well,
10 what else is out there. If there's a two-wheel suitcase
11 out there, then I have to determine the benefit of going
12 from a two-wheeled suitcase to a four-wheeled suitcase,
13 and say how -- what's the ultimate benefit between those
14 different suitcases.

15 If there are no two-wheeled suitcases out
16 there, there are just suitcases without wheels, then I
17 have to perform a similar type valuation between those
18 two alternatives. What's the benefit of having wheels
19 at all versus a suitcase without any wheels.

20 So that's a key component is to understand
21 what else is in the market that would serve as an
22 alternative to the patented technology.

23 Q. And does the -- does there always have to be
24 an alternative? I mean, is there required to be an
25 alternative?

1 A. There's not required to be a commercially
2 acceptable alternative. There's typically prior art or
3 typically some other baseline-type alternative out
4 there. So to use the suitcase example, you know, there
5 are suitcases, right, if I have a -- if I have a patent
6 on a four-wheeled suitcase, I'm -- I'm not inventing a
7 suitcase, I'm inventing a better functionality of a
8 suitcase. So there's typically something to measure
9 against.

10 Q. Now, what -- where did you learn about the
11 state of the art and whether or not there was an
12 acceptable non-infringing alternative in this case?

13 A. Based on discussions with Dr. Almeroth.

14 Q. And what did Dr. Almeroth tell you as to
15 whether or not there is an acceptable non-infringing
16 alternative to infringing the patents?

17 A. Because this is really a key component of the
18 analysis that I performed -- really, to do a valuation
19 of this type you have to really understand what your
20 alternatives are. And so I speak with Dr. Almeroth, and
21 based on his analysis, and I believe he said this in
22 Court yesterday, that there are no non-acceptable -- no
23 acceptable non-infringing alternatives out in the
24 marketplace for this particular technology.

25 And I also looked at NetScout's own expert

1 reports, both their technical expert and their damages
2 expert to see what they were saying was the next best
3 alternative to non-infringement. And neither of them
4 had an opinion with regard to alternatives.

5 Q. So what does the -- the lack of an alternative
6 mean for your analysis?

7 A. It basically means that I need to go back and
8 value these patents based on the prior art. Even though
9 they may not be commercially acceptable in the
10 marketplace, I need to say what's the benefit provided
11 by these patents over the prior art systems.

12 Q. And what do you understand to have been the
13 prior art technology at the time of infringement?

14 A. My understanding of the prior art at the time
15 of infringement was the well-known port methodology of
16 classifying traffic.

17 Q. Now, with respect to your suitcase example, if
18 your analysis assumes based on Dr. Almeroth that there
19 is no non-infringing alternative, does that mean that
20 your analysis assumes the entire benefit of the suitcase
21 is due to the patents?

22 A. It does not.

23 Q. Okay.

24 A. Again, as I stated before, I do have to assume
25 that, you know, maybe people wouldn't buy a suitcase

1 without wheels anymore, but it doesn't mean there are --
2 there's no value to the non-infringing aspects of that
3 patent. So I do need to provide credit for those
4 non-infringing aspects in my analysis.

5 Q. And what NetScout products are using the
6 technical benefits provided by the patents?

7 A. NetScout is using the GeoProbe G10 and the
8 Geo -- GeoBlade systems, those are the accused products
9 in this -- in this case.

10 Q. How does NetScout describe the importance of
11 the accused GeoProbe G10 product?

12 A. I think a lot of this was discussed in
13 testimony yesterday, and some of these same documents
14 were -- were shown yesterday. But for the -- for the
15 GeoProbe G10, NetScout, and -- and previously Tektronix
16 had described this particular product as the center of
17 their network monitoring portfolio, and that it served
18 as the primary collection and correlation agent for
19 their solutions.

20 Q. What about the GeoBlade, does NetScout think
21 the GeoBlade is an important product?

22 A. Yes. And -- and I think this document was
23 shown yesterday, as well. This is a GeoBlade document,
24 PTX-168, that describes the features and functionalities
25 of the GeoBlade, and describes how the GeoBlade

1 leverages highly customized configurations for the
2 tightest control over how network data is processed by
3 protocol and the desired granularity, and describes it
4 as a solution for high traffic volumes.

5 Q. What other NetScout products rely on
6 information being collected and processed by the accused
7 products?

8 A. So there are a lot of other products that
9 NetScout provides that utilizes the data that is
10 processed by the accused products, one of which is --
11 there was a little bit of discussion about this
12 yesterday, as well, which is these Iris applications.

13 And as shown in this document, the GeoProbe
14 G10 is used by those Iris applications that the -- the
15 G10 feeds those applications its data as part of its
16 overall process.

17 Q. So what is the -- what is the next step in
18 your income approach now that we've looked at the
19 importance of the accused products?

20 A. So the next step is to now go through the
21 process. Once I've understood the incremental benefits,
22 once I've understood the importance of the accused
23 products, to go about the process of allocating the
24 revenue and profit to the patents themselves.

25 Q. And can you give us a high-level overview of

1 what this entails?

2 A. I can. I'm going to apologize ahead of time
3 because there's a lot going on in this slide.

4 But basically, this is a summary of the
5 analysis that I performed. And because the law
6 requires, and -- and -- and an economic valuation
7 requires an understanding of what the footprint of the
8 invention is, I have to go about the process of giving
9 credit to NetScout for all of its costs and all of the
10 benefit that is provided to NetScout for its
11 non-infringing -- for the non-infringing aspects of that
12 product. So that's what this process here walks
13 through.

14 And -- and we'll go through this.

15 Q. So what is the first step in the process?

16 A. So the first step in the process is to get an
17 understanding of the overall accused product revenue and
18 direct costs associated with that.

19 Q. And what are direct costs?

20 A. Direct costs are those costs that are directly
21 attributable to the production of the accused products.

22 So the hardware costs, for example, that
23 NetScout has to acquire to put the box together would be
24 a direct cost.

25 Q. And where did you get these figures from?

1 A. So this slide here shows all the revenue and
2 the direct costs associated with the accused products.
3 This information came directly from NetScout. NetScout
4 prepared a document -- prepared financial information
5 specifically for this case. And -- and based on the
6 document, I came to a total accused product revenue of
7 \$408.3 million. And when you take out the direct costs
8 that are associated with that, the gross profit is \$225
9 million.

10 Q. Okay. Now, do the revenue figures on this
11 slide include financial information from the sale of any
12 products that are not at issue in this case?

13 A. They do not. And as I think there was
14 testimony -- video testimony yesterday from Mr. Lindahl
15 from NetScout, he is the one who sort of went about
16 determining which hardware and software was considered
17 to be essential for the product and which products
18 weren't considered to be essential.

19 This analysis only takes into account the
20 revenue based on Mr. Lindahl and NetScout's
21 representation as to the essential hardware and software
22 necessary for the box. I didn't include anything other
23 than that.

24 Q. So are you referring to the series of
25 questions Mr. Lindahl was asked where he was asked

1 whether he included certain things or excluded things?

2 A. That's correct.

3 Q. So what's the next step in the process?

4 A. So after performing this first step, just to
5 summarize it, you'll see that of the \$408.3 million,
6 roughly 45 percent of that gets credited to NetScout for
7 their direct costs. And so we're left with a gross
8 profit of \$224.9 million.

9 Q. So Packet Intelligence is not trying to take
10 credit for the standard cost of sales or the other costs
11 of sales, right?

12 A. That's correct.

13 Q. Okay. So what's the next thing you do in your
14 analysis?

15 A. So the next step in the analysis is to
16 recognize that these accused products are made up of
17 both hardware and software and that there's value to
18 both of those aspects. And because the accused
19 functionality primarily resides in the software, I
20 needed to give NetScout credit for the value of its
21 hardware. This is separate from giving them the costs
22 or -- or giving them credit for the costs they expend
23 for that hardware. They do receive some value from
24 selling that hardware out into the marketplace, so I
25 needed to give them some credit for that.

1 Q. So how did you figure out -- or how did you
2 determine how much credit to give them for hardware?

3 A. Well, NetScout itself doesn't break down or
4 provide financial information as to how much value they
5 get from hardware versus how much value they get from
6 software.

7 So in looking at their internal documents, I
8 did find reference to the fact that NetScout treated its
9 hardware as a commodity. Basically that means that
10 there's no real differentiation in the marketplace
11 between its hardware and other types of hardware out in
12 the market.

13 And then also there was testimony yesterday
14 from Mr. Lindahl who stated that, you know, the value in
15 these products is in the software. They put their money
16 in the software, and that's where primarily this value
17 lives.

18 Q. Okay. So how did you perform this -- how did
19 you come up with the numbers and perform this
20 allocation?

21 A. So because NetScout itself doesn't break this
22 down, I had to look outside of NetScout to see are there
23 any other companies that are out in the marketplace that
24 I could consider to be comparable to a -- a
25 commodity-based hardware manufacturer.

1 And so looking out in the market, I found two
2 examples. So Hewlett-Packard is one, Dell is another,
3 that are considered to be commodity hardware products.
4 They make computer systems, and then they sell those
5 computer systems out into the market.

6 They don't do a lot with customized software.
7 They really just manufacture computers and sell them
8 into the marketplace.

9 So I looked at Dell and HP's financial
10 statements and figured out what their gross margins
11 were, what profit they're receiving from the sale of
12 their hardware. And on average, taking into account
13 both of those companies, the -- the weighted average
14 gross margin for those two companies was 20.7 percent.

15 Q. So what -- what did you do with that 20.7
16 percent?

17 A. So I took that 20.7 percent, and I gave credit
18 to NetScout for that 20.7 percent and deducted that
19 amount from its overall gross profit.

20 Q. And what did you do next?

21 A. So the next step was to recognize that
22 NetScout has what I'll call -- what are called indirect
23 costs. So these are costs that you can't pin directly
24 on any one product but they are necessary in helping to
25 drive revenue.

1 So a good example of that would be sales and
2 marketing. NetScout is going to expend the money to
3 market its products, and because of that, they'll
4 generate additional revenue from that. So I credited
5 NetScout for its overall sales marketing operating
6 expenses.

7 Q. So just to -- just to clarify, what you're
8 saying is NetScout spends money on sales and marketing
9 which generates revenue, and we're not trying to take
10 credit for the revenue they generate -- generate from
11 sales and marketing; is that right?

12 MR. CARR: Objection, Your Honor,
13 leading.

14 THE COURT: Sustained.

15 MR. DAVIS: I'll move on.

16 Q. (By Mr. Davis) So how did you determine the
17 appropriate amount to allocate for sales and marketing?

18 A. So because over the damage period -- over the
19 period of infringement that we're looking at, Tektronix
20 was the manufacturer of these products up until the
21 acquisition in 2015, I went back and looked at
22 Tektronix's overall sales, marketing, and general
23 administrative expenses, analyzed those, and found that
24 on average, Tektronix was spending 28 percent of its
25 revenue on sales, marketing, general, and administrative

1 expenses. So I credited NetScout that 28 percent.

2 Q. Okay. And what does that look like now in
3 terms of the amount of credits or deductions you're
4 giving back to NetScout?

5 A. So as part of that allocation, I credited
6 NetScout 28 percent or 114.5 million for sales,
7 marketing, and operating expenses.

8 Q. Okay. What's next?

9 A. So after I've completed that step, I've now
10 gotten to the point where I have determined the value
11 that's directly attributable to the base software that
12 sits in the accused products. I was -- I've given them
13 all their direct costs, their indirect costs, and the
14 value of the hardware. Now I know what the software is
15 worth.

16 So the next step is to allocate or give credit
17 to NetScout for the non-infringing aspects of the
18 software.

19 Q. How did you go about determining how much
20 credit to give NetScout for the non-infringing aspects
21 of the software?

22 A. So the next step in the process is to figure
23 out exactly where the infringing software lives in the
24 totality of the overall software.

25 And based on the testimony yesterday, my

1 discussions with Dr. Almeroth, the infringing -- the
2 patented technology and NetScout's use of the patented
3 technology is within the overall traffic classification
4 portion of the accused products.

5 So the first thing I did is I looked and I
6 said, can I determine what the value of the traffic
7 classification as a whole is to NetScout?

8 Q. And how did you -- how did you go about doing
9 that?

10 A. First, I looked at a number of NetScout's own
11 documents to see how they described the traffic
12 classification functionality within their products. And
13 as shown here, this is PTX-168. This document describes
14 the GeoBlade as providing control over network data by
15 protocol and desired granularity.

16 I also saw some additional documents which
17 described the -- that the multi -- multi-protocol
18 correlation engine performs advanced correlation of
19 multiple protocols and related traffic to display the
20 results as complete sessions. So seeing how some of
21 these products were described.

22 And finally, I relied on some deposition
23 testimony from the CEO of NetScout, Anil Singhal, who in
24 his testimony, when -- when talking about DPI and DPC
25 functionality as a whole, he stated that everyone knows

1 that -- or he says: There's no business for people to
2 buy our products without these features being there.

3 And then subsequently says: Everyone knows
4 that's the reason they are buying our products.

5 So NetScout's CEO has stated that while
6 there's functionality in these devices, the reason
7 people are buying them is because of the classification
8 features.

9 Q. Now, can you go back to the two documents you
10 discussed just before this deposition testimony and tell
11 the jury what those PTX numbers were?

12 A. Sure. Sorry about that.

13 This document here is PTX-168, which is the
14 GeoProbe/GeoBlade document.

15 And this document talking about Iris Session
16 Analyzer is PTX-239.

17 Q. Now, how -- how were you able to confirm that
18 these documents and -- and Mr. Singhal's deposition
19 testimony described NetScout's traffic characterization
20 features?

21 A. I had a discussion with Dr. Almeroth where we
22 talked about these particular documents, and he
23 confirmed that these -- the references in these
24 documents was talking about the traffic classification
25 features within these products.

1 Q. So based upon your review of these documents,
2 Mr. Singhal's testimony, and Dr. Almeroth, what did you
3 conclude with regard to the value of traffic
4 characterization to the base software?

5 A. Based on those documents, as well as
6 Mr. Singhal's testimony that this is the reason why
7 people are buying these products, I assigned a 50
8 percent value to traffic classification as a whole.

9 Q. Now, I didn't see 50 percent in any of those
10 documents. Why did you use that number?

11 A. I used that number because of the overall
12 importance of traffic classification to these probes.
13 As Mr. Singhal stated that -- that these are the reason
14 people are buying them. This is what they do. They
15 provide traffic classification.

16 Q. And so what did you use to come to the number
17 of 50 percent?

18 A. I used the facts in evidence of this case and
19 the deposition testimony.

20 Q. What about your own personal experience?

21 A. Yes, I used that, as well.

22 Q. What was the next step in your analysis?

23 A. So now that we've allocated not only to the
24 software itself, but now down to the individual traffic
25 classification features, we now have to say what portion

1 of those traffic classification features are directly
2 attributable to these patents, so a further allocation
3 beyond the one just to traffic classification to really
4 get to the patents themselves.

5 Q. So what information did you take into account
6 in -- in this portion of your analysis?

7 A. So as we talked about earlier, a key aspect of
8 this is -- is determining, well, what could have been
9 done without these patents? What would the alternative
10 have been without these patents? And as I stated
11 earlier, it's my understanding that the alternative to
12 these patents is the well-known port methodology.

13 So I looked at various documents and academic
14 papers to determine how does traffic classification
15 work? How effective is -- is traffic classification
16 using a well-known port methodology. And I spoke about
17 this with Dr. Almeroth, as well.

18 And so the first thing I looked at was a
19 Tektronix document from 2008, which stated that
20 classifying by port numbers, which is the well-known
21 port methodology, is no longer considered adequate to
22 classify contemporary protocols. So this confirms what
23 I had stated before in that this really isn't an
24 acceptable non-infringing alternative. It is an
25 alternative. And you can go back to this, but it's not

1 an acceptable one.

2 I also looked at a -- an academic research
3 paper that described their testing with well-known port
4 methodologies. And they found using that methodology,
5 that 30 percent of all traffic was unable to be
6 classified using the well-known port methodology. So
7 looking at all the packets that are streaming across the
8 network, 30 percent of them using the well-known port
9 methodology, they had no idea what it was.

10 Q. And if you could go back to the prior slide, I
11 see there's not a PTX number on this slide, could you
12 read what the number is at the bottom, please?

13 A. Sure. It's NetScout_197184.

14 Q. Okay. And okay, please continue with -- go
15 back to the document you were on and do the same thing,
16 please.

17 A. So for this document, it's Bergman 00000489.
18 So in addition to this academic paper, I also found an
19 additional one, this paper is Bergman 00000505, which
20 also did a study of well-known port methodologies and
21 found that 30 to 70 percent of all Internet traffic was
22 unable to be classified using the well-known port
23 methodology.

24 Q. So then what did you do based on that
25 information to perform your analysis?

1 A. So based on that -- so based on getting an
2 understanding of what does the alternative to
3 non-infringement look like, I had to then say, well,
4 what does a NetScout product -- how much traffic is it
5 classifying?

6 And I was unable to find any NetScout-specific
7 documents that described their overall traffic
8 classification, how much they recognized. But I think
9 as we heard yesterday from Dr. Almeroth, he described
10 best of breed solutions, classifying traffic between 90
11 and 95 percent.

12 There's a document from a company called
13 Sandvine, which provides similar-type classification
14 functionality, which also stated that best of breed
15 solutions recognize at least 90 percent of traffic.
16 This document is SANDVINE0004311.

17 And then I also -- to confirm this idea that
18 NetScout would be considered best of breed, I spoke with
19 Dr. Almeroth, and he said based on his understanding of
20 the company and his understanding of the technology, he
21 considered it to be a best of breed solution.

22 But I also looked and saw that in 2011, for
23 the probe market, so the same market that these accused
24 products live in, Tektronix had a 25 percent market
25 share in the industry, second highest only to -- well,

1 second highest only to NetScout at 28 percent, which
2 leads me to believe that this company is a best of breed
3 solution, you don't get a 25 percent market share in an
4 industry without having a quality product.

5 Q. So what portion of that is attributed to
6 the -- the asserted patents?

7 A. So based on conversations that I had with Dr.
8 Almeroth, looking at the well-known port methodology and
9 the percentage of traffic that can be classified using
10 that methodology, and then looking at what the best of
11 breed solutions provide, Dr. Almeroth told me that the
12 vast majority of that increase, based on his analysis,
13 was due to these individual patents.

14 And then he also said that beyond just simply
15 being able to classify traffic, there are additional
16 benefits to the patents such as having a better
17 understanding of the context of the traffic, greater
18 insight into the overall traffic, and increased quality
19 of service metrics.

20 Q. So based on all of this evidence and your
21 discussions with Dr. Almeroth, what was your
22 conclusion -- what was your conclusion as far as the
23 next step in your analysis?

24 A. Again, because of -- of my discussions with
25 Dr. Almeroth where he stated that the vast majority of

1 this increase, going from -- anywhere from 30 to 70
2 percent all the way up to 90 to 95 percent, was due to
3 the patents-in-suit, I determined that the value of the
4 patents to the traffic characterization functionality
5 was 50 percent.

6 Q. So where are we now in this incremental
7 benefit analysis that you've been performing?

8 A. So after giving credit to NetScout, starting
9 with their revenue, giving them credit for their costs,
10 giving them credit for their -- the non-infringing
11 functionality, that's in the base software, and not
12 including any of the products and services that are --
13 are given benefit to from these patents that weren't
14 part of the \$408.3 million, I determined that the
15 allocation in the patents-in-suit would be 15.6 million.

16 And if you were to say, well, what does that
17 mean on a percentage basis, 15.6 million over 403.8
18 (sic) million is a 3.8 percent rate.

19 Q. Let's -- can you tell the jury now about the
20 other approach that you -- that you applied? Oh, well,
21 what -- what are you showing here in this slide?

22 A. So this is an overall summary slide of the
23 allocation from the accused product revenue of 408.3
24 million and where all of the deductions occurred so that
25 at the end of the day, we have a rate of 3.8 percent or

1 that \$15.6 million.

2 Q. Now, you also applied the market-based
3 approach. And you had -- you used these two approaches.

4 Can you explain, again, why you used the two
5 approaches?

6 A. Yes. So as I -- as I stated earlier, the
7 income approach determines value based on the revenue
8 and profitability of the company and ultimately the
9 infringing features.

10 The market-based approach is a completely
11 separate type analysis, doesn't include any of the data
12 that we looked at under the income approach and says is
13 there a way that I can find a comparable transaction in
14 the marketplace to help me determine what a reasonable
15 royalty would be in this case?

16 Q. And what did you conclude under the market
17 approach?

18 A. Based on a comparable transaction in the
19 marketplace, I determined that a reasonable royalty
20 based on that comparable transaction would be 3.5
21 percent. And if you apply that to the \$408.3 million of
22 the total accused product revenue, you get to \$14.3
23 million.

24 Q. Okay. So how do you apply -- if you can now
25 take us through your -- the specifics of your analysis,

1 how did you apply the market approach in this case?

2 A. Well, I looked at the facts and evidence of
3 the case and tried to find either comparable licensing
4 agreements or other types of transactions that -- that
5 determine -- that that did a similar type valuation to
6 come to a reasonable royalty. And I think it's been
7 discussed a number of times in trial that in 2009, Exar
8 acquired Hi/Fn, which was the owners of the patents in
9 2009 for \$59 million. That acquisition included 43 U.S.
10 patents and foreign patents, including the patents in
11 this case.

12 And as part of that process, and this is
13 typical for these types of valuations, a financial
14 advisory firm will come in and attempt to allocate that
15 purchase price to the books and records of the acquiring
16 company.

17 And as part of that process, they -- they
18 attempted to determine the value of the patents to Hi/Fn
19 and hired a company named Duff & Phelps to perform this
20 valuation.

21 Q. Okay. Who is Duff & Phelps?

22 A. Duff & Phelps is an investment advisory firm
23 that typically performs these types of valuations.

24 Q. What is their reputation?

25 A. They have a very strong reputation in the

1 market.

2 Q. How do you calculate a reasonable royalty
3 based upon this Hi/Fn/Exar transaction?

4 A. Well, as part of Duff & Phelps' valuation,
5 they -- they performed what they called a relief from
6 royalty-type valuation in order to determine the value
7 of the patents. And as part of that process, they spoke
8 with management, they looked at other transactions that
9 occurred in the market, and they determined that under
10 the relief from royalty approach, a 2 percent royalty
11 should be attributable to the patents.

12 And then following -- once that was done,
13 following the acquisition, Exar recorded on its books an
14 intangible asset.

15 Q. What else did you review as part of your
16 market approach?

17 A. So taking that information into account, the
18 next step is really to determine, well, based on that
19 information, can I come to some kind of indication of
20 comparability? And knowing that the transaction
21 included the patents-in-suit, that immediately jumps out
22 to me as something that can be considered comparable.

23 So next step is to say, well, what other
24 factors are there that I need to take into account? And
25 so I recognized that there were foreign patents, as well

1 as U.S.-based patents in that transaction. But the way
2 that Duff & Phelps applied the 2 percent royalty, they
3 applied it equally to U.S.-based revenue as they did to
4 foreign revenue. So that, to me, says that there's no
5 distinction between the U.S. patents and the foreign
6 patents when it comes to the 2 percent.

7 Secondly, I need -- I need to look at the
8 other U.S.-based patents that were there, so Packet
9 Intelligence acquired 10 U.S.-based patents, so there
10 were 3 U.S.-based patents and patent applications left.

11 One of the applications that was left was
12 abandoned.

13 The second application was expired because
14 they didn't pay their -- Exar didn't pay the fees on
15 them.

16 The third patent is still held by Exar, but we
17 know from testimony yesterday that Exar is not really
18 doing anything with these patents.

19 And then, finally, I had to look at the
20 non-asserted patents in this case to say is there value
21 I need to ascribe to those non-asserted patents, and
22 based on discussions that I had with Packet Intelligence
23 when I issued my report, as well as an understanding
24 from Mr. Brunell's testimony yesterday, that there was
25 really no incremental benefit to -- to asserting any

1 additional patents in this case.

2 So with all that, I determined that the
3 2 percent royalty rate was comparable in this case.

4 Q. And so -- but what adjustments did you make,
5 if any, to the 2 percent royalty rate from the Duff &
6 Phelps -- the Duff & Phelps valuation?

7 A. So once we have the 2 percent, we now need to
8 go through the process of saying, well, how do we apply
9 that in this case? And this sort of goes back to our
10 discussion as to a real-world negotiation versus a
11 hypothetical negotiation. And the 2 percent number was
12 derived in sort of that real-world negotiation. So we
13 now have to take into account all those factors that
14 would come into play in a hypothetical negotiation.

15 And one of those factors is knowing that the
16 patents in this case are assumed to be infringed and
17 valid. The Duff & Phelps' valuation, if it was based on
18 discussions with management and existing transactions,
19 those transactions wouldn't have occurred with the
20 assumption of infringement and validity. So there needs
21 to be some kind of adjustment there.

22 Secondly, knowing that the parties to the
23 hypothetical negotiation have full knowledge of the
24 benefits that are being provided by the patents-in-suit,
25 there are a tremendous amount of benefits being provided

1 to the non -- some -- there is non-accused products in
2 this case, so the parties to that hypothetical
3 negotiation would know that Packet Intelligence would
4 know that not only is NetScout benefiting from the sales
5 of these individual products but there are products that
6 rely on the accused products that are also generating
7 benefits and that some adjustment to the royalty rate
8 would be required based on that.

9 Q. And so can you explain a little bit further
10 what you mean about the benefit to the non-accused
11 products?

12 A. Yeah. So I had a discussion with Dr.
13 Almeroth, and he stated that a number of non-accused
14 products that NetScout provides would be severely
15 degraded if NetScout didn't have access to these
16 patents.

17 And what's shown on your screen here is the
18 list of those products that have been identified as
19 being something that would be degraded without use of
20 these patents.

21 So taking those and looking at the financial
22 aspects of those individual products -- and this is
23 separate and distinct from the \$408.3 million. This is
24 revenue outside of the accused products. Taking all of
25 those products together and looking at the revenue and

1 gross profit attributable to those non-accused products,
2 NetScout received \$325.4 million for those products and
3 earned a gross profit of \$173 million, which is roughly
4 equivalent, a little bit less, than the amount of
5 revenue and profit they received on the accused
6 products.

7 Q. So based on -- on those factors and that
8 information, what did you conclude?

9 A. So based on those factors, I -- I concluded
10 that a -- that the reasonable royalty in this case,
11 using the hypothetical negotiation, would be three and a
12 half percent.

13 Q. Now, did you find any other indicators of
14 value using the market approach that would inform you
15 or -- or assist you as to what a reasonable royalty rate
16 in the hypothetical negotiation would be under the
17 market approach?

18 A. I did. I found two other indicators of value.
19 The first is the Cisco settlement agreement. That
20 agreement, the -- **REDACTED BY ORDER OF THE COURT** There's a lot
21 of comparabilities to this agreement. For one, Packet
22 Intelligence was a party to that agreement, so -- just
23 as is -- as is the hypothetical negotiation, Packet
24 Intelligence would have been a party to that.

25 The litigation included the asserted patents,

1 so similar to the hypothetical negotiation, that
2 settlement agreement included the asserted patents.

3 And we know from NetScout's public financial
4 statements that in the probe market, NetScout considers
5 Cisco to be a competitor. So that also led to -- and
6 some belief that there is some comparability to this
7 agreement.

8 Q. Based on those factors, what did you conclude?

9 A. So unfortunately, I was unable to really take
10 this agreement and come to a quantitative solution to a
11 reasonable royalty in this case because there wasn't a
12 clear understanding of exactly how much revenue Cisco
13 was earning from the -- from the products in that case
14 and how to compare that to what NetScout was doing. But
15 overall, this does give me an indication that Cisco
16 believed that these patents were valuable.

17 So -- and then, secondly, I also looked at the
18 Huawei licensing discussions that occurred as part of
19 the Huawei settlement agreement. And we heard Mr.
20 Brunell's testimony that as part of that discussion,
21 Packet Intelligence made it clear that they wouldn't
22 accept anything less than a 2 -- 2.5 percent royalty,
23 and ultimately, received that 2.5 percent royalty.

24 Q. Who is Mr. David Yurkerwich?

25 A. Mr. Yurkerwich is NetScout's damages expert in

1 this case.

2 Q. And what was Mr. Yurkerwich's conclusion with
3 regard to the appropriate reasonable royalty rate in
4 this case?

5 A. So based on Mr. Yurkerwich's report that was
6 issued in this case, as shown here on this screen at
7 Page 51 of his report, he's concluded that he agrees
8 with a 3.5 percent royalty rate.

9 Q. Now, Mr. Yurkerwich did not agree with you as
10 to the base, correct?

11 A. That's correct.

12 Q. Okay. But as far as the royalty rates in this
13 case, what did the two experts determine to be,
14 including yourself and Dr. Yurkerwich -- Mr. Yurkerwich,
15 what did you determine to be the appropriate royalty
16 rates based on three different methodologies?

17 A. So based on the three different methodologies,
18 based on my income approach, I came to an effective
19 royalty of 3.8 percent. Under the market approach, a
20 running royalty rate of 3.5 percent. And Mr. Yurkerwich
21 came to a royalty rate also of 3.5 percent.

22 Q. Now, what is your opinion with regard to the
23 appropriate royalty base to be applied in this case?

24 A. So as we've already discussed, because it's my
25 understanding that the accused functionality and that

1 the -- the patents themselves, the benefit to the
2 patents themselves is within every GeoBlade and GeoProbe
3 G10, and as part of the core classification
4 functionality, in my opinion, the total base is the --
5 is the overall revenue associated with the accused G10
6 and GeoBlade products, which is the \$408.3 million.

7 Q. Now, earlier we discussed the factors that you
8 need to take in account in the determination of the
9 royalty, the reasonable royalty. As part of your
10 investigation, did you analyze and consider all of those
11 factors?

12 A. Yes. While we didn't talk about them
13 individually today, based on my performing both the
14 income approach and the market approach, all of the
15 factors here have been analyzed and taken into account
16 in my opinions.

17 Q. Now, based on the totality of the analysis
18 that you performed in this case, can you please
19 summarize your opinions for the jury as to what a
20 reasonable royalty in this case is?

21 A. I can. So, again, under the income approach,
22 a reasonable royalty in this case, I came to a -- an
23 amount of 15.6 million.

24 Under the market approach, using the 3.5
25 percent running royalty, I came to an amount of \$14.3

1 million.

2 Q. Okay.

3 MR. DAVIS: No further questions at this
4 time, Your Honor. I pass the witness.

5 THE COURT: All right. Ladies and
6 gentlemen, before we proceed with the Defendants'
7 cross-examination of Mr. Bergman, we're going to take a
8 short recess.

9 You may close and leave your notebooks in
10 your chairs. Don't discuss the case among yourselves.
11 Follow my instructions, and we'll be back shortly to
12 continue with the cross-examination.

13 The jury's excused for recess at this
14 time.

15 COURT SECURITY OFFICER: All rise for the
16 jury.

17 (Jury out.)

18 THE COURT: The Court stands in recess.

19 COURT SECURITY OFFICER: All rise.

20 (Recess.)

21 (Jury out.)

22 COURT SECURITY OFFICER: All rise.

23 THE COURT: Be seated, please.

24 All right. Mr. Bergman, if you want to
25 return to the witness stand.

1 And, Mr. Carr, you're going to conduct
2 the cross-examination?

3 MR. CARR: Correct, Your Honor.

4 THE COURT: If you'd like to go to the
5 podium, you can do that now.

6 MR. CARR: Thank you.

7 THE COURT: Are there binders to pass out
8 here, Counsel?

9 MR. CARR: I've already passed them out,
10 Your Honor.

11 THE COURT: Good.

12 All right. Mr. Elliott, let's bring in
13 the jury.

14 COURT SECURITY OFFICER: Rise for the
15 jury.

16 (Jury in.)

17 THE COURT: Welcome back, ladies and
18 gentlemen. Please have a seat.

19 We'll proceed with cross-examination of
20 Mr. Bergman by defense counsel.

21 Mr. Carr, you may proceed.

22 CROSS-EXAMINATION

23 BY MR. CARR:

24 Q. Good morning, Mr. Bergman.

25 A. Good morning.

1 Q. In your testimony this morning, you referred
2 to multiple conversations with Dr. Almeroth, right?

3 A. I referred to a conversation with Dr.
4 Almeroth.

5 Q. So did you only have one conversation with Dr.
6 Almeroth?

7 A. I had one conversation, yes.

8 Q. So prior to submitting your report, you only
9 had one conversation with Dr. Almeroth, right?

10 A. That's correct.

11 Q. And that conversation lasted approximately one
12 hour?

13 A. I believe that's right.

14 Q. And that was the day your report was due, June
15 5th, 2017, correct?

16 A. It was on the morning my report was due, I
17 filed my report that evening.

18 Q. And you did not talk to him before that date,
19 did you?

20 A. I did not.

21 Q. You relied upon Dr. Almeroth's -- your
22 conversation with Dr. Almeroth to assume that the core
23 traffic characterization feature of all G10 and GeoBlade
24 products infringe, correct?

25 A. Can you repeat that question, please?

1 Q. Your damages estimates that the core traffic
2 characterization feature of the G10 and GeoBlade
3 products accused of infringement here infringe the
4 patents, correct?

5 A. That's correct.

6 Q. And that is based upon your discussion with
7 Dr. Almeroth, right?

8 A. It's based on the discussion with Dr. Almeroth
9 and the review of the NetScout/Tektronix documents.

10 THE COURT: Please speak up, Mr. Bergman.

11 THE WITNESS: I apologize.

12 Q. (By Mr. Carr) And you did not perform an
13 independent analysis as to whether there was any
14 infringement of the Tektronix products, right?

15 A. I did not perform an infringement analysis,
16 no.

17 Q. Nor did you perform an analysis as to
18 whether -- whether any of the three asserted patents are
19 valid, correct?

20 A. That's correct.

21 Q. Do you recall yesterday Dr. Almeroth testified
22 about a feature called web page download time?

23 A. I remember hearing discussion about web page
24 downloads.

25 Q. You did not mention the web page download time

1 feature in your expert report, correct?

2 A. That's correct.

3 Q. And you did not analyze the web page download
4 time feature preparing your damages estimate, right?

5 A. I didn't specifically discuss it. It may be
6 one of the features listed in one of the schedules in my
7 report, but I don't know for sure.

8 Q. Are you referring to a schedule of non-accused
9 products?

10 A. Yes.

11 Q. You did not discuss the web page download time
12 feature with Dr. Almeroth, correct?

13 A. That's correct.

14 Q. And you did not include sales of the web page
15 download time feature in your royalty base, correct?

16 A. That's correct. Again, unless it's part of
17 the essential features that comprised my royalty base,
18 but I don't know that sitting here.

19 Q. Is it your understanding that there are no
20 sales of the web page download time feature in the
21 United States?

22 A. I have no knowledge of that.

23 Q. Mr. Bergman, the asserted patents in Court
24 today this week, they were acquired by Exar when they
25 acquired a company, Hi/Fn, correct?

1 A. Yes, sir.

2 Q. And you testified this morning about a
3 valuation that an independent corporate advisor
4 performed in connection with that valuation. Their name
5 is Duff & Phelps, right?

6 A. They performed an accounting exercise to
7 determine how to allocate the value of the patents on
8 the books and records of Exar.

9 Q. And they valued more than just the Hi/Fn
10 patents, didn't they?

11 A. They acquired -- they valued the Hi/Fn
12 portfolio of patents, yes.

13 Q. And they also valued Hi/Fn's core technology,
14 correct?

15 A. The core technology was listed as part of the
16 Duff & Phelps methodology, but at the end of the day,
17 the entire allocation went on the books and records of
18 Exar as patents.

19 Q. Now, Hi -- I'm sorry, Duff & Phelps estimated
20 that 2 percent represented a reasonable royalty rate
21 that a user would pay for the patents and core
22 technology of Hi/Fn, correct?

23 A. I believe that's -- that was their conclusion,
24 yes.

25 Q. And in that conclusion, they also considered,

1 in addition to Hi/Fn's patents, Hi/Fn's trade secrets,
2 right?

3 A. Again, I know that was part of the analysis
4 based on their ultimate allocation of value to patents
5 on the books and records of Exar. I'm not sure they
6 found any value to Hi/Fn's trade secrets.

7 Q. And the number of patents that Exar obtained
8 when it acquired Hi/Fn was approximately 40 patents and
9 applications, correct?

10 A. I believe the number I saw was 43, so that
11 sounds about right.

12 Q. And the hypothetical negotiation, you base
13 your damages opinion on, that's discussing a license to
14 just the three patents asserted by Packet Intelligence,
15 right?

16 A. That's correct.

17 Q. Now, your ultimate royalty rate for the
18 license to those three asserted patents is 3.5 percent?

19 A. Based on the market approach.

20 Q. You would agree that that is a 75 percent
21 increase over Duff & Phelps's 2 percent royalty rate
22 for -- that a user would pay for a license to 43 patents
23 and applications and trade secrets, right?

24 A. That's correct.

25 Q. That acquisition took place in 2009?

1 A. Yes, sir.

2 Q. Exar owned the patents for approximately three
3 years -- what I'm saying -- let me rephrase that.

4 Exar owned the three asserted patents for
5 approximately three years when it sold them in 2012 to
6 Packet Intelligence, correct?

7 A. I believe that's correct.

8 Q. And Exar sold Packet Intelligence a total of
9 10 U.S. patents, 14 foreign patents; is that right?

10 A. I don't remember the exact number, but that
11 sounds about right.

12 Q. In your opinion -- it's your opinion that
13 Packet Intelligence was able to purchase those patents
14 at a discount, right?

15 A. I think the facts show that they purchased
16 those patents at a discount, yes.

17 Q. And that's because the patents could be
18 asserted against Excel -- Exar's customers so Packet
19 Intelligence would have recognized that, and it's your
20 opinion they would have been able to negotiate a
21 discounted price?

22 A. I -- I think that may -- that's part of it.
23 Part of it is that Exar was a company that wasn't using
24 the technology and was supplying products to companies
25 who would have been using the technology. So from

1 Exar's standpoint, there would have been a hesitation to
2 try to license those patents to their customers.

3 Q. Is it because those patents could then be used
4 to be asserted against Exar's customers?

5 A. I don't know if I would go so far as to say
6 asserted against them, but they would -- I think they
7 would have been hesitant to attempt to license patents
8 to their customers.

9 Q. If Exar is selling patents that are going to
10 potentially be used to bring a lawsuit against Exar's
11 customers, wouldn't Exar charge a premium, make the
12 price higher for those patents, rather than putting them
13 out into the marketplace at a discount?

14 A. Not necessarily.

15 Q. Indeed, you note in your expert report that
16 Exar's customers include Huawei and Cisco, right?

17 A. Yes.

18 Q. And they ended up being sued by Packet
19 Intelligence on the same patents they purchased from
20 Exar, right?

21 A. Yes.

22 Q. Mr. Bergman, with -- in connection with your
23 market approach, you indicated that the Huawei agreement
24 between Packet Intelligence and Huawei was an indicator
25 of value in your analysis; is that right?

1 A. No, sir.

2 Q. What was incorrect about that?

3 A. It wasn't the agreement itself. It was Packet
4 Intelligence's insistence on a particular royalty rate
5 because Packet Intelligence would have been a party to
6 this hypothetical negotiation. Knowing their mindset
7 going into that hypothetical negotiation is a relevant
8 factor in the determination of a reasonable royalty.
9 So I did not use the agreement itself. I used Packet
10 Intelligence's negotiation posture for that agreement.

11 Q. That agreement, the payment terms were for
12 Huawei to pay \$140,000, right?

13 A. That's correct.

14 Q. And this agreement ran -- covered all of
15 Packet Intelligence's U.S. patents, correct?

16 A. I believe that's correct.

17 Q. That includes 10 -- at least 10 U.S. patents?

18 A. It's been awhile since I've looked at the
19 agreement, but I think that that's right.

20 Q. And here, the hypothetical agreement between
21 Packet Intelligence and NetScout is just to the three
22 asserted patents, right?

23 A. That's correct.

24 Q. And one of the reasons you didn't rely upon
25 the actual agreement between Packet Intelligence and

1 Huawei was because Huawei was discontinuing its U.S.
2 product line; is that right?

3 A. That was one factor of many, yes.

4 Q. Did you also consider in your analysis that
5 NetScout would be discontinuing its G10 and GeoBlade
6 product line?

7 A. I did not.

8 Q. You indicated that the Cisco license was also
9 an indicator of value in your market approach, right?

10 A. I believe it's something that the parties to
11 the hypothetical negotiation would have taken into
12 account, yes.

13 Q. Now, Cisco is much larger than NetScout and
14 Tektronix, right?

15 A. If you compare company to company, yes. But I
16 think if you look at the probe market, which is what
17 we're talking about here, Tektronix and NetScout, based
18 on the market share document that I presented in my
19 direct, Cisco is not even in that market -- or not
20 represented by that market share chart.

21 Q. Are you aware that Cisco is the 12th largest
22 IT company in the United States?

23 A. I wasn't aware of that specifically, but it
24 doesn't surprise me.

25 Q. Are you aware that it has more than 70,000

1 employees?

2 A. Again, I wasn't aware of that number, but that
3 doesn't surprise me.

4 Q. Are you aware that Tektronix has 500 employees
5 in Plano?

6 A. I wasn't aware of the number, but that doesn't
7 surprise me.

8 Q. That license agreement between Cisco and
9 Packet Intelligence, that included license to all of
10 Packet Intelligence's patents and applications, right?

11 A. That's correct.

12 Q. That would include 10 U.S. patents, right?

13 A. Yes.

14 Q. 11 U.S. patent applications?

15 A. The 11 patent applications that are listed in
16 the Cisco agreement are -- or 10 of those 11 are the
17 same 10 -- represent the same 10 patents that were
18 actually issued. So from that standpoint, it double
19 counts the number of patents.

20 The 11th patent was the provisional
21 application that was filed. So it would -- that -- that
22 was never meant to be a patent to begin with. So just
23 purely from a U.S.-based standpoint, there were 10
24 patents licensed under the Cisco agreement.

25 Q. And foreign patents were also licensed in that

1 agreement, as well, correct?

2 A. That's correct.

3 Q. Approximately 11 foreign patents?

4 A. I don't remember exactly. There were some
5 issues about double counting and in the foreign patents,
6 as well, but I think it would have been eight or nine,
7 something like that.

8 Q. When you're referring to double counting, are
9 you -- are you suggesting that the foreign patents are
10 a -- an equivalent of a U.S. patent?

11 A. No, what I'm saying is that in -- in the list
12 of foreign patents in the Cisco application, there were
13 a list of foreign applications, as well as foreign
14 patents, and so there would be a -- I think it was a
15 Japanese -- one or two of the Japanese patents, it
16 listed the application in that list, and then
17 subsequently listed the issued patent for that
18 application. So effectively it was the same patent.

19 Q. Mr. Bergman, the license agreement with Cisco
20 licensed all of Cisco's products, didn't it?

21 A. I believe so.

22 Q. Not just its routers?

23 A. I believe all Cisco's products.

24 Q. Not just its probes, right?

25 A. I believe it was all Cisco's products.

1 Q. And it is your opinion that the license
2 agreement between Packet Intelligence and Cisco would
3 not be used in the hypothetical negotiation as a basis
4 to determine a reasonable royalty, correct?

5 A. That's correct.

6 Q. Didn't make your damages figure go up or down,
7 right?

8 A. It didn't make it go up or down, but it did
9 give me comfort that the ultimate determination of a
10 reasonable royalty was reasonable.

11 Q. Mr. Bergman, you testified about citations to
12 the three asserted patents. You recall that?

13 A. I do.

14 Q. And based on your review of those forward
15 citations, you determined that they indicated the three
16 patents are valuable?

17 A. I think it indicates that they have value.

18 Q. Now, you didn't actually review each of those
19 patent citations, did you?

20 A. Not in preparation of my report, no.

21 Q. You didn't look to see whether those citations
22 criticized the asserted patents, did you?

23 A. I didn't look at them. So I can't answer that
24 question.

25 Q. Did you determine whether you double counted

1 any of the citations?

2 A. I did not.

3 Q. So you wouldn't know, for example, whether the
4 citations were by the patent examiner or by the patent
5 applicant, right?

6 A. I didn't do that level of review.

7 Q. You testified this morning about a separate
8 approach to calculating damages under an income
9 approach, correct?

10 A. Yes, sir.

11 Q. One step in your income approach is that you
12 opine that traffic characterization makes up 50 percent
13 of the value of the software in the accused G10 and
14 GeoBlade products, right?

15 A. Based on the facts and circumstances of this
16 case, yes.

17 Q. And part of the basis for that assumption is
18 your one-hour -- one-hour conversation with Dr. Almeroth
19 on the day your report was due, right?

20 A. One part, yes.

21 Q. Now, you recall yesterday that Dr. Almeroth
22 testified that deep packet inspection alone does not
23 infringe?

24 A. Yes, sir.

25 Q. This allocation of 50 percent, it was not a

1 precise mathematical calculation, right?

2 A. It was not. It was an estimate.

3 Q. You next opined that the asserted patents in
4 this case make up 50 percent of the value of traffic
5 characterization, right?

6 A. Yes, sir.

7 Q. And, again, the basis for that assumption is
8 your one-hour conversation with Dr. Almeroth on the day
9 your report was due, right?

10 A. It was based on a review of the percentage of
11 traffic that can be characterized using the prior art
12 technology versus the percent of traffic that can be
13 characterized using best of breed solutions, like
14 NetScout's solution, and an understanding from Dr.
15 Almeroth that the vast majority of that increase is due
16 to the patents-in-suit.

17 Q. When you refer to the prior art technology,
18 are you referring to what you discussed as well-known
19 ports?

20 A. Yes, sir.

21 Q. Isn't RMON2 TrackSessions an alternative that
22 also relies on well-known ports?

23 A. If it were an alternative, it wasn't
24 identified by NetScout.

25 Q. You didn't consider the TrackSessions

1 alternative in reaching your 50 percent estimate, did
2 you?

3 A. Sorry, can you ask me that question one more
4 time?

5 Q. You didn't consider whether TrackSessions was
6 a well-known port in reaching your 50 percent estimate
7 that the patents make up 50 percent of the value of
8 traffic characterization, did you?

9 A. I did not.

10 Q. Mr. Bergman, it's not your opinion that the
11 functionality alleged to be covered by the asserted
12 patents in this case drive sales of the G10 and GeoBlade
13 products, right?

14 A. It is not my opinion that it drives sales.

15 Q. In one of your slides, Mr. Bergman, you wrote:
16 Given Tektronix's interest and support of the
17 NAVL-enabled DPC option --

18 MR. CARR: Strike that. I'll start over.

19 Q. (By Mr. Carr) You discussed at -- a witness,
20 David Yurkerwich, in your testimony this morning,
21 correct?

22 A. I'm sorry, can -- the question got a little
23 jumbled. So can you try it again?

24 Q. You mentioned -- you mentioned a report
25 provided by David Yurkerwich in your testimony this

1 morning, correct?

2 A. That's correct.

3 Q. And you had a slide where you said: Given
4 Tektronix's interest and support of the NAVL-enabled DPC
5 option at the time of the hypothetical negotiation, I
6 have concluded that they would have agreed to the three
7 and a half percent royalty rate.

8 Now, that discussion is referring to
9 NAVL-enabled DPC option, correct?

10 A. I just want to be clear because I don't think
11 it was in your question, that that slide and what you
12 just read was Dr. -- or Mr. Yurkerwich's opinion, not my
13 opinion.

14 Q. Right. And he was talking about the
15 NAVL-enabled DPC feature, right?

16 A. Yes.

17 Q. And that feature is not in all the accused G10
18 and GeoBlade products, right?

19 A. It's my understanding that that's an optional
20 feature in the product.

21 Q. In fact, you considered that to be a
22 non-accused product, right?

23 A. That's not my opinion, but it -- it is -- it
24 is an optional product, and I believe it is in my
25 non-accused -- the list of additional products that

1 would have been degraded but for these patents. I think
2 it's in that list.

3 Q. Is it your understanding that there were only
4 two sales in the United States of the NAVL-enabled DPC
5 feature?

6 A. I don't recall exactly.

7 Q. Do you recall that the total revenue for those
8 two sales in the United States is for 147 -- \$147,000 --
9 I'm sorry. \$147,928?

10 A. I don't recall.

11 Q. You testified about a hypothetical negotiation
12 in 2010 between Packet Intelligence and NetScout, right?

13 A. That's correct.

14 Q. And that negotiation never actually took
15 place, right?

16 A. It did not.

17 Q. In fact, Packet Intelligence didn't exist in
18 2010, right?

19 A. That's correct.

20 Q. NetScout and Tektronix didn't even learn about
21 these patents until this lawsuit was filed in 2016,
22 right?

23 A. I think based on the forward citation
24 information I've reviewed, I don't think that's correct.

25 Q. Are you aware of any evidence that Packet

1 Intelligence tried to license the three asserted patents
2 to NetScout or Tektronix prior to filing this lawsuit?

3 A. I don't know one way or the other.

4 Q. Now, in 2010, Tektronix made and sold the G10
5 product, right?

6 A. That's correct.

7 Q. And Tektronix sold the GeoBlade starting in
8 2015, right?

9 A. I can't remember if it was 2014 or 2015, but
10 in that time frame, yes.

11 Q. In your damages testimony this morning, you
12 assume that the three asserted patents are valid and
13 infringed, correct?

14 A. I think the law requires me to assume that,
15 yes.

16 Q. And if the patents are not valid, then there
17 are no damages, right?

18 A. I believe that's correct. It's more of a
19 legal question, but I believe that's right.

20 Q. And if the patents are not infringed, then
21 there are no damages?

22 A. Same response, I think that's right.

23 MR. CARR: Pass the witness.

24 THE COURT: Counsel, approach the bench.

25 (Bench conference.)

1 THE COURT: You do have some redirect,
2 Mr. Davis?

3 MR. DAVIS: Yes, briefly, Your Honor.

4 THE COURT: Okay. Mr. Carr, at least
5 twice in this trial, I've heard references to Tektronix
6 has 500 employees in Plano. You wouldn't be saying they
7 were in Plano if they were in Mumbai, and I wouldn't let
8 the other side be painting you as having foreign
9 employees. It's not fair for you to paint yourself as a
10 hometown/home district employer. You can reference the
11 number of employees, but I don't want to hear anymore
12 references to where they're located, okay?

13 MR. CARR: I understand.

14 MR. DAVIS: Your Honor, may I speak to
15 that real quick? I was going to approach you during one
16 of the next witnesses, Mr. Kenedi, about this issue
17 because they have done that twice. And I'm prepared to
18 cross their witnesses on the issue.

19 The fact that Net -- NetScout is not just
20 Tektronix 500 employees in Plano, but NetScout is a
21 worldwide company that has 3,000 employees. And I think
22 we're entitled to do this not only to rebut the fact
23 that they've violated the motion in limine, but that
24 they've used the 500 employees in Plano as a comparison
25 and are a contrast against the size of Cisco to say that

1 Cisco is a huge company and they're a small 500-person
2 company. And that's inaccurate.

3 THE COURT: We're -- we're going to avoid
4 any geographical connotations going forward. If you
5 want to make it clear that NetScout is more than
6 Tektronix, and they have more employees than the 500
7 that have been mentioned, that's fine. And if you want
8 to make it clear from a high level that their other
9 employees are in other locations, that's fine. But
10 we're going to avoid we're local, we're not local, we're
11 foreign, we're domestic, we're hometown employers, we're
12 out-of-town interlopers. That's not a part of this
13 trial. And it shouldn't have come in the two times it's
14 come in. And it's not coming in again, okay?

15 MR. DAVIS: Okay. Thank you.

16 THE COURT: Wait a minute. Wait a
17 minute. I want to make it clear to Defendant, I think
18 Defendant knows this. I assume this -- Mr. Bergman is
19 your last witness before you rest?

20 MR. DAVIS: Yes, Your Honor.

21 THE COURT: Okay. I'll defer any motions
22 under Rule 50(a) from the Defendant until all the
23 evidence is in, and I'll hear motions under 50(a) from
24 both parties then. But just in case you're under a
25 different impression, I will not hear motions by

1 Defendant under Rule 50(a) when the Plaintiff rests,
2 okay?

3 MR. CARR: Okay.

4 THE COURT: All right. Let's proceed.

5 (Bench conference concluded.)

6 THE COURT: All right. Redirect of the
7 witness by the Plaintiff?

8 MR. DAVIS: Yes, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. DAVIS:

11 Q. Mr. Bergman, you were asked on
12 cross-examination about the fact that Packet
13 Intelligence has asserted less than all the patents in
14 this case. If Packet Intelligence asserted more patents
15 in this case or less patents in this case, would that
16 change the economic footprint and the value that
17 NetScout has used of the patented technology?

18 A. It's my understanding, based on discussions
19 with Packet Intelligence and -- and Mr. Brunell's
20 testimony yesterday, that the additional -- the addition
21 of other patents wouldn't have changed the overall
22 value.

23 Q. Now, we've heard a few times in this trial
24 about the fact that NetScout -- or Tektronix has 500
25 employees in Plano. And we've heard about it in the

1 context of comparing it to Cisco, and that Cisco is a
2 much bigger company. Are you aware of the size of
3 NetScout?

4 A. Not precisely. I know it's a much bigger
5 company than -- than Tektronix by itself.

6 Q. Now, you mention --

7 THE COURT: Mr. Bergman, speak up,
8 please, sir.

9 THE WITNESS: I'm sorry.

10 THE COURT: If I can't hear you or if I'm
11 straining to hear you, I worry that the jury is having
12 the same trouble and certainly the people in the
13 gallery, so please try to make yourself heard.

14 THE WITNESS: I apologize.

15 THE COURT: Go ahead, Counsel.

16 MR. DAVIS: Thank you, Your Honor.

17 Q. (By Mr. Davis) You mentioned that for Cisco,
18 even though it's a bigger company, what is the relative
19 size of Cisco and NetScout in the relevant market?

20 A. So when -- part of the issue with the Cisco
21 agreement and why I couldn't determine it to be
22 comparable is the methodology that I need to employ is
23 to make sure that I can put the two companies on equal
24 footing, that Cisco is paying 19 and a half million
25 dollars for a license to the patents. How do I make

1 that comparable to what NetScout would be paying?

2 And so Cisco would not pay a royalty based on
3 its total global footprint for every product that it
4 makes. It would only focus on those products that
5 embodied the patents. That was -- that's the only thing
6 that it would pay for.

7 And for a number of Cisco products -- Cisco
8 sells very large integrated routers that have a
9 tremendous amount of functionality in them. And from my
10 understanding of the accused products in the Cisco case,
11 the classification features would be a small portion of
12 those overall products.

13 As opposed to this case, from NetScout's
14 perspective, where the classification features are core
15 to the functionality. And as Mr. Singhal said, they
16 wouldn't sell any of them without classification
17 features.

18 So because of the inability to compare the
19 footprint of what Cisco is paying for versus what
20 NetScout would pay for in a hypothetical negotiation, it
21 doesn't make sense. It's a complete apples and oranges
22 comparison.

23 Cisco's total number of employees and total
24 number of -- of revenue generated worldwide has
25 absolutely nothing to do with this investigation.

1 Q. Now, you were also asked on cross-examination
2 about the Huawei license. And you were asked whether
3 you considered in this case whether NetScout was going
4 to discontinue the accused products in this case. Do
5 you recall that -- being questioned about that?

6 A. I do.

7 Q. Now, when was the first time that you've heard
8 that NetScout may be discontinuing the products?

9 A. I seem to recall some testimony in the
10 record -- I don't recall from which NetScout
11 representative -- that there was a discussion about
12 maybe -- maybe discontinuing the products, but I don't
13 recall exactly.

14 Q. Are you aware of whether they discontinued the
15 products today?

16 A. I don't know. And, frankly, it's not relevant
17 to my analysis because I'm performing a valuation from
18 the date of first infringement, which is December 2010,
19 up until today. Whether or not they discontinue the
20 products after the fact doesn't have a bearing on my
21 reasonable royalty.

22 Q. Now, is it typical for a company that is
23 settling a patent lawsuit to license all of the patents
24 in a portfolio?

25 A. It's not only typical, it's pretty much

1 standard.

2 Q. So is the fact that Cisco took a license to
3 settle its lawsuit to Packet Intelligence to all of the
4 patents in the PI portfolio, does that change your
5 analysis at all?

6 A. It's -- it's something you need to consider.
7 You need to look at what the totality of the licensing
8 agreement is, but in -- in my experience, any settlement
9 agreement, any licensing agreement for patents are going
10 to include the totality of the patent portfolio.

11 Q. Now, Mr. Bergman, what is -- what are the
12 products that are accused in this lawsuit?

13 A. The GeoProbe G10 and the GeoBlade.

14 Q. You were asked on cross-examination about the
15 NAVL -- excuse me, the NAVL-enabled DPC feature. And
16 you were asked about whether you knew that for that
17 feature, only \$147,000 had been sold. Are you aware of
18 that?

19 A. I remember that testimony, yeah.

20 Q. And does that -- does that data point change
21 your analysis at all with respect to what's actually
22 accused in this case?

23 A. No. Again, my understanding is that the core
24 traffic classification features built within these
25 products are what is infringing these patents, and

1 that's my relevant accused product base.

2 Q. And finally, you were asked about whether
3 NetScout knew of the patents prior to 2016. Is
4 NetScout's knowledge of these patents relevant at all to
5 the -- to the reasonable royalty analysis?

6 A. It's not.

7 MR. DAVIS: No further questions, Your
8 Honor.

9 THE COURT: You pass the witness?

10 MR. DAVIS: I pass -- pass the witness,
11 Your Honor.

12 THE COURT: Is there additional cross,
13 Mr. Carr?

14 MR. CARR: Nothing further, Your Honor.

15 THE COURT: All right. Mr. Bergman, you
16 may step down, then.

17 THE WITNESS: Thank you.

18 THE COURT: All right. Plaintiff, call
19 your next witness.

20 MR. DAVIS: Your Honor, members of the
21 jury, at this time, the Plaintiff rests.

22 THE COURT: All right. The Plaintiff
23 having rested its case-in-chief, we'll proceed with the
24 Defendants' case-in-chief.

25 Defendants, are you prepared to call your

1 first witness?

2 MS. SMITH: We are, Your Honor. Our
3 first -- first witness for NetScout will be Mr. Richard
4 Kenedi.

5 THE COURT: All right. Mr. Kenedi, if
6 you'll come take a seat on the witness stand. You've
7 previously been sworn, correct?

8 THE WITNESS: Correct.

9 THE COURT: All right.

10 MR. KRAEUTLER: Your Honor, during Mr.
11 Kenedi's testimony, we're going to use a demonstrative
12 that is a blow-up, and may I at the appropriate time put
13 an easel here? I'll just block our table and nothing
14 else so the jury can see it.

15 THE COURT: I think that will work.

16 MR. KRAEUTLER: Thank you, Your Honor.

17 THE COURT: If I have a problem with it,
18 I'll let you know.

19 MR. KRAEUTLER: I know you will, sir.

20 THE COURT: Go ahead -- go ahead and use
21 it.

22 MR. KRAEUTLER: All right.

23 THE COURT: Or attempt to use it.

24 All right. Counsel, you may proceed with
25 your direct examination.

1 RICHARD KENEDI, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

2 DIRECT EXAMINATION

3 BY MR. KRAEUTLER:

4 Q. Sir, will you introduce yourself to the jury?

5 A. Yes, my name is Richard Kenedi.

6 Q. Mr. Kenedi, where do you work?

7 A. I work at NetScout.

8 Q. And how long have you worked at NetScout?

9 A. I've worked at NetScout since July of 2015.

10 Q. What is your position there?

11 A. I am president of new markets business unit.

12 Q. Have you ever testified before?

13 A. I have not.

14 Q. Prior to NetScout, did you work at Tektronix?

15 A. Yes, I did.

16 Q. How long did you work at Tektronix?

17 A. I started with Tektronix in 2005.

18 Q. And -- and can you tell us, do you have a
19 family?

20 A. I do. I have a wife of -- she's -- I met her
21 in Texas. She's -- of 25 years. We celebrated our 25th
22 anniversary last year.

23 Q. And do you have any children?

24 A. I do. We have a 20-year-old daughter and an
25 18-year-old son.

1 Q. Where did you grow up?

2 A. A combination of Canada, the United States.

3 Q. And could you please describe your educational
4 background?

5 A. I have a Bachelor's of applied science with
6 electrical engineering. And a Master's of business
7 administration.

8 Q. How did you come to live and work in the
9 United States?

10 A. I started my career in Toronto, Canada working
11 for a company called Bell Northern Research which was a
12 subsidiary of Northern Telecom. And in 1990 they were
13 expanding their -- their development for mobile systems
14 in the United States, and I had an option of going to
15 California or Texas, and I elected to come to Texas.

16 Q. Are you a U.S. citizen?

17 A. Yes. Shortly after moving to -- to the Texas
18 area, I met my wife, as I mentioned earlier, and I was
19 eligible to become a citizen in 1996, and I became a
20 citizen at that time.

21 Q. Can you describe generally the positions you
22 held at Tektronix between 2005 when you joined the
23 company and 2015?

24 A. Yeah. Sure. I started in 2005 as senior
25 director of diagnostics, general manager, senior

1 director of diagnostics.

2 Over the course of time, I got additional
3 responsibilities. In about the 2010 time frame, I was
4 promoted to vice president of testing optimization.

5 Shortly after that, in 2011, I took on a role
6 of vice president of products and portfolio.

7 And then in 2014, I was promoted to president
8 of Tektronix Communications.

9 Q. And did you remain in that position until
10 Tektronix became part of NetScout during 2015?

11 A. That's correct.

12 Q. Through your work at Tektronix, are you
13 familiar with Tektronix's corporate history?

14 A. Yes.

15 Q. And through your work at NetScout, are you
16 familiar generally with NetScout's corporate history?

17 A. Yes.

18 Q. Prior to appearing here today, did you prepare
19 a demonstrative exhibit that would show information
20 about the -- the two companies?

21 A. Yes, I did.

22 Q. And is that in the form of a timeline?

23 A. Yes, it is.

24 MR. KRAEUTLER: Your Honor, may I? Thank
25 you.

1 THE COURT: You may.

2 MR. KRAEUTLER: And, Your Honor, may I
3 invite the witness to -- to speak from the -- the board?

4 THE COURT: I don't see any need for
5 that. We have a laser pointer if you want him to point
6 to something specifically on the board, but I see no
7 reason he should leave the witness stand.

8 MR. KRAEUTLER: Okay. I understand.
9 And it is -- it is visible to you, Mr. Kenedi?

10 THE WITNESS: It is visible to me.

11 MR. KRAEUTLER: Okay.

12 THE COURT: You can certainly move it
13 closer if you need to.

14 MR. KRAEUTLER: Your Honor, let me then
15 just request -- may I stand here so I can see --

16 THE COURT: As long as you'll be loud
17 enough to where we're all hearing you.

18 MR. KRAEUTLER: Okay. I'll do my best,
19 Your Honor.

20 Q. (By Mr. Kraeutler) So --

21 MR. DAVIS: Your Honor, may I -- may I
22 reposition?

23 THE COURT: You may.

24 MR. DAVIS: Thank you, Your Honor.

25 Q. (By Mr. Kraeutler) So, Mr. Kenedi, what is

1 shown in the top portion of the document?

2 A. There's a timeline of Tektronix
3 Communications's history in the top portion, the red
4 portion, if you will.

5 Q. And what is shown in the bottom portion?

6 A. A very brief overview of the NetScout history.

7 Q. Now, the top portion shows not only key events
8 in the history of the corporation but also some product
9 information; is that correct?

10 A. Correct.

11 Q. The accused products in this case are the
12 GeoProbe G10 product and the GeoBlade product. In what
13 year was the G10 product introduced to the market?

14 A. The G10 product was introduced in 2010.

15 Q. And the GeoBlade product?

16 A. The GeoBlade product was introduced in 2014.

17 Q. And are those products -- are those products
18 both members of a GeoProbe family of products?

19 A. They are.

20 Q. And can you describe what the timeline shows
21 as to the GeoProbe family?

22 A. Yes. If I may, actually, just to introduce
23 the jury to a little bit of the history, in 1989, there
24 was a company formed called Inet in Plano, and that
25 company actually produced the first GeoProbe, which was

1 the 12U, and the 12U introduced capability to support
2 what we call the call trace application. It also
3 supported second generation wireless capabilities that
4 was just coming into the marketplace.

5 Q. And then what was the next step in the
6 development of the GeoProbe family?

7 A. As new technology was being introduced, third
8 generation wireless capabilities, we introduced a new
9 GeoProbe called the 14U that supported that 3G
10 technology, but it also provided additional scale to the
11 probing platform as these networks, AT&T, Verizon, et
12 cetera. These networks were growing, they had more
13 subscribers so we had to have higher performance probes
14 introduced to support that.

15 Q. And then what was the next step in the
16 development of the GeoProbe family?

17 A. In 2004, Inet was acquired by Tektronix. When
18 Inet was acquired by Tektronix, we -- we came into
19 Tektronix, if you will, and Tektronix already was an
20 existing company that was providing instrumentation
21 capabilities. You might have heard of oscilloscopes,
22 logic analyzers, those types of components, so they
23 created a division called Instruments. And then Inet
24 basically formed the communication division.

25 THE COURT: Mr. Kenedi, the Court

1 Security Officer has given you a laser pointer. If
2 you'd care to use that addressing the board.

3 THE WITNESS: Okay.

4 THE COURT: You don't have to, but it's
5 there if you'd like to use it.

6 THE WITNESS: I appreciate that. Thank
7 you.

8 THE COURT: All right. Please continue.

9 A. After Tektronix acquired Inet, as we discussed
10 earlier, the -- the next GeoProbe that was introduced
11 was the G10 in 2010, and then the GeoBlade in 2014.

12 Q. (By Mr. Kraeutler) And I think you've now
13 discussed some of the key events in the corporate
14 history of Tektronix, including the founding of Inet,
15 the acquisition of Inet by Tektronix. What is the next
16 thing that happened in terms of the corporate history of
17 Tektronix?

18 A. There's actually one thing that is not on the
19 chart that I will also mention because it was brought up
20 a little bit earlier.

21 In 2007, Danaher Corporation acquired
22 Tektronix. And when Tektronix moved into the Danaher
23 Corporation, which had roughly 60 different operating
24 companies, they created two operating companies. One
25 was Tektronix, Inc., the instrument portion of

1 Tektronix. The other one was Tektronix Communications.
2 So we went into the Danaher family of operating
3 companies at that time.

4 In 2015, NetScout acquired Tektronix
5 Communications, along with other operating companies
6 from Danaher.

7 Q. Now, the products at issue, what kinds of
8 customers are those products sold to?

9 A. Telephone or telecom service providers.

10 Q. And what is -- what are the products used for
11 by the telephone companies?

12 A. We would -- these probes that we created, we
13 would put them into these networks. You can imagine
14 AT&T as an example, it has capabilities all across the
15 United States. We would deploy our probes across the
16 United States, and it would assist them with
17 troubleshooting and performance management of their
18 network.

19 Q. Now, let me ask you just to look at the bottom
20 portion of the board, and what information is depicted
21 there?

22 A. A -- a very brief outline of NetScout
23 history -- corporate history.

24 Q. And could you describe that history?

25 A. Yes. In 1984, the company was formed under

1 the name of Frontier Software Development, the bottom
2 left corner of the diagram. It was actually founded by
3 Anil Singhal, who is the current CEO of NetScout. And
4 it was formed in Chelmsford, Massachusetts.

5 In 1997, the name was changed to NetScout
6 Systems. And obviously other things occurred through
7 the course of history, but in 2015, as we mentioned, it
8 was the acquisition of Tektronix Communications.

9 Q. How many employees does NetScout currently
10 have?

11 A. I believe just under 3100 employees.

12 Q. And are they located in the United States and
13 other parts of the world?

14 A. Yes.

15 Q. Has the Tektronix business continued?

16 A. Yes.

17 Q. And what is the current name of Tektronix
18 Texas?

19 A. NetScout Texas.

20 Q. And does that company continue to manufacture
21 products?

22 A. Yes, it does.

23 Q. What kinds of products?

24 A. Software products, probing products.

25 Q. And what kinds of customers does NetScout sell

1 to generally?

2 A. NetScout Texas or NetScout?

3 Q. NetScout Texas?

4 A. NetScout Texas sells to service providers --
5 telephone company service providers.

6 Q. Does -- does NetScout Texas sell to any other
7 type of company?

8 A. No.

9 Q. Can you provide any examples of the customers?

10 A. The customers would be AT&T, Verizon,
11 CenturyLink, Cricket, those types of providers.

12 Q. Does net -- does -- did Tektronix or does the
13 current NetScout Texas business ever sell to enterprise
14 data network customers?

15 A. No.

16 Q. What is the function of a probe in the context
17 of the customers of Tektronix and now the NetScout Texas
18 business?

19 A. I can give you an example. I'm sure
20 everyone's had cellular service and has used mobile
21 phones. One example would be if you had a dropped call
22 while you were using your phone, we would provide the
23 ability for the service provider to be able to
24 understand why that call was dropped, as well as do
25 performance management on the overall network.

1 Q. Has -- did Tektronix ever compete with Cisco?

2 A. No.

3 Q. Do you compete with Cisco today in the
4 telephone service provider market?

5 A. No.

6 Q. The probes at issue in this case, the G10
7 GeoProbe and the GeoBlade probe, do they contain both
8 hardware and software?

9 A. Yes, they do.

10 Q. Is the hardware proprietary?

11 A. Yes. The G10 and GeoBlade are proprietary
12 platforms.

13 Q. Could they be characterized as commodity
14 products?

15 A. Not at all.

16 Q. How important to the functionality of these
17 probes, the G10 and the GeoBlade, is the hardware?

18 A. I'd say extremely. One of the things that is
19 very, very important for us is the ability to perform,
20 to be able to be successful at what we do in these very
21 large networks, and be able to do it at a price
22 performance range that would meet our customer needs.

23 So we built specialized hardware capability in
24 order to get that performance for our customers.

25 Q. How do the telephone company customers use the

1 data that is collected by the GeoProbe products?

2 A. They use it for troubleshooting and
3 performance management.

4 Q. And what do you mean by troubleshooting?

5 A. The example that I used for a dropped call
6 would be an example where they could look at one of our
7 applications and understand where in the network there
8 was an issue that might have caused that dropped call.

9 Q. And how do they use the products for
10 performance management?

11 A. There's some performance indicators, as we
12 call them, that are generated. And they can look at
13 those performance indicators and understand how various
14 different elements or how services within the network
15 are performing.

16 Q. Prior to March 2016, when this lawsuit was
17 filed, had you ever heard of Packet Intelligence?

18 A. I did not.

19 Q. Had you ever heard of the Dietz patents?

20 A. I did not.

21 Q. Had you ever heard of Russell Dietz or Joseph
22 Maixner or -- of any of the alleged inventors in this
23 case?

24 A. I did not.

25 Q. Had anyone contacted Tektronix on behalf of

1 Packet Intelligence to make inquiries about the GeoProbe
2 products?

3 A. I am not aware of any communication.

4 Q. Had anyone contacted Tektronix to determine
5 whether Tektronix would be willing to license any
6 particular products in the Dietz family -- or patents,
7 rather, in the Dietz family?

8 A. No.

9 MR. KRAEUTLER: Pass the witness.

10 THE COURT: All right. Cross-examination
11 by the Plaintiff.

12 MR. DAVIS: Yes, Your Honor.

13 THE COURT: Are you going to use this
14 demonstrative in your cross, Mr. Davis?

15 MR. DAVIS: Briefly I am, Your Honor, and
16 I'd also like to use the easel.

17 THE COURT: All right. Then we'll leave
18 it up.

19 Let's proceed.

20 MR. DAVIS: Thank you, Your Honor.

21 THE COURT: And, Mr. Kraeutler, while
22 he's using the demonstrative, if you want to reposition
23 yourself so that you can see the board, you're welcome
24 to do that, okay?

25 MR. KRAEUTLER: Thank you, Your Honor.

1 THE COURT: Let's go forward.

2 MR. DAVIS: Thank you, Your Honor. And
3 just briefly I can go ahead and use this and take care
4 of that.

5 CROSS-EXAMINATION

6 BY MR. DAVIS:

7 Q. You mentioned, Mr. Kenedi, that in 2015,
8 NetScout was -- acquired Tektronix; is that correct?

9 A. Tektronix Communications, that's correct.

10 Q. And what was the -- what was the value of that
11 acquisition?

12 A. There was four operating companies that were
13 acquired, and the overall value of the acquisition was
14 \$2.3 billion.

15 Q. And do you have any sense for the amount of
16 revenue of those -- that group of companies that the
17 Tektronix component -- that represented?

18 A. It was in the range of \$800 million.

19 Q. Okay. Thank you.

20 MR. DAVIS: Your Honor, I don't think I
21 need this anymore. May I remove it?

22 A. Mr. Davis, can I just make sure it's clear
23 that was the combination of all four companies?
24 That's -- that was the question, correct?

25 THE COURT: All right.

1 Q. (By Mr. Davis) Yes.

2 A. Yes. Okay.

3 THE COURT: You may take the
4 demonstrative down if you're through with it.

5 MR. DAVIS: Thank you, Your Honor.
6 You can actually leave that there if you'd like. I'm
7 going to use that.

8 MR. CARR: All right.

9 MR. DAVIS: Thank you.

10 Q. (By Mr. Davis) Now, we've heard a lot in this
11 case about Tektronix Plano, employees, there's only 500,
12 and I believe on direct examination, we've heard for the
13 first time that NetScout is a global company with over
14 3,000 employees; is that correct?

15 A. That's correct.

16 Q. Okay. And you understand, sir, that how many
17 employees are in Plano versus anywhere else in the world
18 is really not relevant to the issues in this case?

19 A. I would not know its relevance, sir.

20 Q. You don't know whether those issues are
21 relevant to this case?

22 A. I -- it depends on the circumstance and the
23 question being asked around it.

24 THE COURT: Approach the bench, Counsel.

25 (Bench conference.)

1 THE COURT: You covered it with Bergman,
2 you've now covered it with him, I don't want any more
3 geographical references as to who has employees where.
4 The number of employees is fine. But we're not going to
5 try this on who's located in Plano, who's located
6 outside of Plano, okay?

7 MR. DAVIS: Your Honor, if I can just
8 make one observation.

9 THE COURT: You've -- you've had more
10 than enough opportunity.

11 MR. DAVIS: Okay. All right.

12 THE COURT: Let's move on.

13 MR. DAVIS: All right.

14 (Bench conference concluded.)

15 THE COURT: Let's proceed.

16 Q. (By Mr. Davis) Mr. Kenedi, I think you've
17 testified on direct that NetScout does not compete with
18 Cisco; is that correct?

19 A. NetScout Texas, that's correct.

20 Q. Okay.

21 MR. DAVIS: Could we see, please,
22 PTX-120.

23 I'm sorry that's the wrong exhibit. 190.

24 Thank you, yes.

25 And if I could have Page 11.

1 All right. And if you could, please,
2 highlight the -- the second full paragraph.

3 Q. (By Mr. Davis) Now, this is the 10-K from --
4 from NetScout; is that correct?

5 A. I didn't see the front cover fast enough to --

6 MR. DAVIS: Could you go back to the
7 front page, please?

8 A. Yes, it is the 10-K.

9 Q. (By Mr. Davis) It's the 2016 annual report on
10 Form 10-K, correct?

11 A. Correct.

12 MR. DAVIS: If we could go back to Page
13 11, please.

14 If we could highlight, again, the second
15 full paragraph -- sorry, the next paragraph.

16 Q. (By Mr. Davis) It says here, sir, that: In
17 the service provider market, we compete with probe
18 vendors, network equipment manufacturers, big data and
19 analytics vendors, and virtualization vendors. These
20 vendors include Alcatel-Lucent, Astellia, Anritsu,
21 Cisco, Empirix.

22 And the list goes on. Do you see that, sir?

23 A. I do.

24 Q. You're here today, sir, as the corporate
25 representative of NetScout; is that right?

1 A. Yes, I am.

2 Q. So you are the face of NetScout for this
3 trial?

4 A. That is correct.

5 Q. And NetScout in this case is making some
6 accusations; is that correct?

7 A. NetScout is making accusations?

8 Q. Yes.

9 A. Can you please elaborate?

10 Q. Well --

11 MR. DAVIS: Could I have the opening
12 slide, Page 28.

13 Sorry, from the opening transcript.

14 Q. (By Mr. Davis) Now, this was the transcript
15 of the opening statement that was delivered in this case
16 by your attorney. And if you will read with me, in Line
17 5, Mr. Kraeutler said: This case is about taking
18 something that doesn't belong to you. It's about stolen
19 ideas, and it's about taking credit for what other
20 people have done.

21 Do you see that, sir?

22 A. I do.

23 Q. So in this case, you are accusing Mr. Dietz of
24 stealing something, aren't you?

25 A. You can interpret it that way from this

1 sentence, yes.

2 Q. I don't think there's any interpretation here,
3 sir. Doesn't it say "stolen"?

4 A. Yes.

5 Q. And you're also accusing Mr. Dietz of taking
6 credit for what other people have done; is that correct?

7 A. That's correct.

8 Q. Okay. And, Mr. Kenedi, are you here to stand
9 up -- stand behind those allegations?

10 A. Yes.

11 Q. And it is your belief that Mr. Dietz has lied
12 and stolen, is that your opinion?

13 A. It is my belief through my -- through my
14 Counsel that the claims against NetScout are false.

15 Q. And it's your belief, and your Counsel has
16 apparently given you these beliefs, that Mr. Dietz has
17 lied and that he's stolen and you're here to represent
18 those -- those accusations, aren't you?

19 A. My belief is formed from the experts within
20 our company. My belief is also formed from both
21 internal and external counsel that we've used for this
22 case.

23 Q. Okay. And it's your belief and it's your
24 accusation that Mr. Dietz is a liar and a thief,
25 correct?

1 A. It's my belief in what is written on the
2 screen.

3 MR. DAVIS: Objection, Your Honor.
4 Non-responsive.

5 THE COURT: Overruled.

6 Q. (By Mr. Davis) Now -- and -- and -- okay.
7 And what is written on the screen is that Mr. Dietz
8 stole something and that he's taking credit for
9 something that doesn't belong to him, correct?

10 A. Yes, absolutely correct.

11 Q. So --

12 MR. DAVIS: Your Honor, if I may approach
13 the easel?

14 THE COURT: You may.

15 Q. (By Mr. Davis) I'd like to walk you through,
16 sir, some of the characters in this case and talk about
17 them individually because there are certain characters
18 in this case that I think represent --

19 THE COURT: Let's ask him questions,
20 Mr. Davis, don't tell him what you want to talk about.

21 Q. (By Mr. Davis) Let's start with Mr. Dietz,
22 please.

23 THE COURT: You may move to see the easel
24 if you want to, Mr. Kraeutler.

25 MR. KRAEUTLER: I was standing for a

1 different reason, Your Honor.

2 THE COURT: Well, tell me what that
3 reason is.

4 MR. KRAEUTLER: I -- I was going to
5 listen to the question.

6 THE COURT: You can hear better standing
7 up than sitting down?

8 MR. KRAEUTLER: No, I'll sit down, but
9 I -- I -- I may be up again soon.

10 THE COURT: If you would like to move so
11 that you can see what he writes on the board, you're
12 welcome to; otherwise, maintain your position at the
13 bar.

14 Let's proceed.

15 MR. KRAEUTLER: Thank you, Your Honor.

16 Q. (By Mr. Davis) Now, Mr. Dietz in this case
17 obviously does not agree with you in your accusation
18 that he's a liar and a thief, does he?

19 A. I don't know what he believes, sir.

20 Q. Well, you were here in the courtroom when he
21 testified, weren't you?

22 A. Yes, I was.

23 Q. And you heard him deny vehemently the
24 accusations that you made against him?

25 A. I did.

1 Q. Okay. So you do know that he disagrees with
2 you, correct?

3 A. I do know what he testified yesterday, yes,
4 sir.

5 Q. Okay. So Mr. Dietz doesn't agree with you
6 about the accusations that you've made.

7 What about Mr. Maixner, you heard him take the
8 stand and testify. Does he agree with you that -- that
9 Mr. Dietz is a liar and a thief?

10 A. I don't know what Mr. Maixner believes.

11 Q. Well, did you hear him testify, sir?

12 A. I did.

13 Q. Did you hear him deny that he got -- that they
14 got their ideas for the inventions anywhere other than
15 their own creative effort?

16 A. I did. I did hear that.

17 Q. Okay. Now, the other inventors, do you have
18 any -- any reason to believe that the other inventors on
19 these patents agreed with you that Mr. Dietz stole and
20 lied about the inventions in this case?

21 A. Again, Mr. Davis, I'm not familiar with what
22 those other inventors believe.

23 Q. You don't have any reason to think that they
24 agree with you, correct?

25 A. I don't have any reason to think about the

1 other inventors, sir.

2 Q. Well, the other inventors are part of the
3 invention, aren't they?

4 A. Yes.

5 Q. And if the other -- and they all signed the
6 same oath to the Patent Office representing that what
7 they invented was their own, correct?

8 A. I would -- I would believe so, yes.

9 Q. And so you don't have any reason to believe
10 that the other inventors were lying to the Patent
11 Office, do you?

12 A. I do not have any reason, sir.

13 Q. What about the company Apptitude, did you hear
14 Mr. Dietz testify about Apptitude?

15 A. Yes.

16 Q. Apptitude was the company that he worked for,
17 correct?

18 A. Yes.

19 Q. And you heard about how Mr. Dietz's boss came
20 to him and said, look, we need to get some patents on
21 your technology, do you remember that?

22 A. Yes.

23 Q. Do you think Apptitude had any reason to
24 believe that Mr. Dietz had lied or stolen the ideas for
25 inventions from the RMON group?

1 A. I don't really know the details of the
2 relationship between Apptitude and Mr. Dietz.

3 Q. But as far as you know, you don't have any
4 reason to believe that Apptitude was in on the lies or
5 the stealing?

6 A. I -- I don't know anything about Apptitude.
7 It was the first time I heard about the company.

8 Q. Okay. And Apptitude put money and resources
9 into getting the patents on the technology, didn't they?

10 A. If Mr. Dietz said so, then I would assume that
11 that is the case.

12 Q. You remember hearing testimony about a company
13 called Hi/Fn?

14 A. I do.

15 Q. Okay. And do you recall that testimony?

16 A. Yes.

17 Q. Do you think that Hi/Fn had any belief that
18 Mr. Dietz stole or lied about getting the patents?

19 A. I do not know Hi/Fn's position on it, sir.

20 Q. Okay. Well, you do know that Hi/Fn paid money
21 to acquire the company, don't you?

22 A. From what I heard yesterday, yes.

23 Q. And part of the value of that company was the
24 patents?

25 A. I would assume so.

1 Q. Okay. What about the United States Patent
2 Office, the United States Patent Office have any reason
3 to believe that Mr. Dietz lied or stole to get the
4 inventions -- about the inventions in his patents?

5 A. I would assume if the United States Patent
6 Office received all the information necessary, they
7 would have no reason to assume anywise.

8 Q. Well, and -- but we do know that the United
9 States Patent Office issued the patents, correct?

10 A. Yes, we do.

11 Q. And we do know that the Patent Office was
12 aware of RMON, correct?

13 A. Just from what we heard yesterday.

14 Q. I mean, RMON is all throughout the patent,
15 isn't it?

16 A. I understand it's referenced, yes, but I have
17 not read the patent.

18 Q. Okay. So you haven't read the patent?

19 A. I have not.

20 Q. And yet you've come in here and you've decided
21 that Mr. Dietz has lied and stolen about his inventions?

22 A. Yes.

23 Q. In fact, Mr. Anil Singhal, who's going to
24 testify later, he hasn't read the patent either, has he?

25 A. I do not know.

1 Q. What about the company Exar, do you recall
2 hearing testimony about Exar?

3 A. Yes.

4 Q. And do you recall how much money Exar paid to
5 acquire -- to acquire Hi/Fn?

6 A. I do not recall.

7 Q. Does \$59 million sound about right?

8 A. I -- now that you mention it, yes, I remember
9 the number.

10 Q. What about Packet Intelligence? Packet
11 Intelligence, do they have any reason to believe that
12 Mr. Dietz lied or stole to get the inventions in this
13 case?

14 A. I do not know, sir.

15 Q. Packet Intelligence started a business based
16 upon the Dietz portfolio, didn't it?

17 A. Yes, they did.

18 Q. And you heard Mr. Brunell testify that he
19 actually read the RMON specification before buying the
20 patents-in-suit, didn't he?

21 A. Yes, he did.

22 Q. Do you think that Mr. Brunell would put his
23 own money into buying a company if he thought that there
24 was some issue with those patents?

25 A. It appeared that Mr. Brunell was very

1 carefully placing his money into those patents.

2 Q. What about all the companies that forward
3 cited to the patents at issue in this case? There were
4 hundreds of them, weren't there?

5 A. As I understand it, yes.

6 Q. Okay. Now -- and then what about Cisco?
7 Cisco was a company that paid a lot of money to take a
8 license to these patents, didn't they?

9 A. Yes.

10 Q. And we've all discussed how much that license
11 was for, correct?

12 A. Yes.

13 Q. Did Cisco allege that Mr. Dietz had stolen
14 these patents?

15 A. I do not know the conversation between Cisco
16 and Packet Intelligence.

17 Q. Do you think Cisco would pay that kind of
18 money if they thought that Mr. Dietz had lied or stolen
19 to get the patents?

20 A. It's possible.

21 Q. You also know that Cisco was part of the RMON
22 group, correct?

23 A. I'm not familiar with the RMON group.

24 Q. What about Huawei? Huawei is another company
25 that took a license to these patents. Did Huawei assert

1 that the patents were invalid because Mr. Dietz had
2 stolen or lied to get them?

3 A. I do not know Huawei's position on the
4 patents.

5 Q. Okay. Now, with regard to Mr. Dietz, you're
6 aware, sir, that Mr. Dietz has a top secret security
7 clearance, correct?

8 A. I heard so yesterday.

9 Q. They don't give top security -- top secret
10 security level clearances to people that lie, do they?

11 MR. KRAEUTLER: Objection.

12 THE COURT: State your objection.

13 MR. KRAEUTLER: Your Honor, it's well
14 beyond the scope of direct.

15 MR. DAVIS: Your Honor, he's not --

16 MR. KRAEUTLER: And -- and relevance,
17 it's not adding anything.

18 MR. DAVIS: Your Honor, he's the
19 corporate rep of the company. He's here to defend the
20 claims that he's made against Mr. Dietz. I'm entitled
21 to -- to question him about the validity of those
22 claims.

23 THE COURT: I don't see that this witness
24 has any knowledge about what is or isn't required to
25 obtain a top secret security clearance. I'm going to

1 sustain the objection. It calls for the witness to
2 speculate beyond his knowledge.

3 Let's proceed.

4 Q. (By Mr. Davis) You did hear, sir, that Mr.
5 Dietz does have a top secret level security clearance?

6 A. Yes, I did.

7 MR. KRAEUTLER: Objection.

8 THE COURT: What's your objection?

9 MR. KRAEUTLER: It's the same objection,
10 Your Honor.

11 THE COURT: No. He asked him a question:
12 Did he hear that Mr. Dietz had a top -- top secret
13 security clearance? He has personal knowledge of that
14 because he was in the courtroom yesterday when Mr. Dietz
15 testified to it. That objection is overruled.

16 Answer the question, Mr. Kenedi.

17 A. Yes, I did hear that yesterday.

18 Q. (By Mr. Davis) You also heard that he took
19 lie detector tests?

20 A. I don't recall that yesterday.

21 Q. Do you recall that Mr. Dietz testified that he
22 is the chief security officer and general manager of
23 industrial Internet cyber security?

24 A. Yes.

25 Q. Do you have any understanding of what that job

1 entails?

2 A. I do not know the details.

3 Q. Did you hear Mr. Dietz testify about the fact
4 that that involves protecting our energy systems?

5 A. Yes.

6 Q. Including nuclear power plants?

7 A. Yes.

8 Q. Mr. Dietz has a job in this case, doesn't he?

9 A. Mr. Dietz has a job in this case?

10 MR. DAVIS: Strike that.

11 Q. (By Mr. Davis) Mr. Dietz has a job, doesn't
12 he?

13 A. Yes, he does.

14 Q. We just described that job. Mr. Dietz does
15 not have any financial interest in the outcome of this
16 case, does he?

17 A. He said he did not.

18 Q. He has no -- he gets -- he does not get
19 compensated based upon whether this jury awards for
20 Packet Intelligence or not, does he?

21 A. He said he did not.

22 Q. He traveled from California to come here to
23 testify of his own volition, didn't he?

24 A. I do not know.

25 Q. Now, you don't have any reason to believe that

1 any of these companies that we just discussed believed
2 that Mr. Dietz lied or cheated to get the patents, do
3 you?

4 A. As I said, sir, I do not know the beliefs of
5 those companies.

6 Q. In fact, you, sir, are the only one who is
7 accusing Mr. Dietz of lying and cheating to get these
8 patents, aren't you?

9 A. Of the list that you have on that board,
10 yes --

11 Q. Now --

12 A. -- as far as I know.

13 Q. You're not aware of anyone else, are you?

14 A. I'm not aware of anyone else.

15 Q. When did NetScout make the accusation that Mr.
16 Dietz had lied and cheated to get the patents in this
17 case?

18 A. In our opening statement, I would assume
19 formally, but I'm not aware of whether it was done
20 earlier or not.

21 Q. In the context of this lawsuit, right, sir?

22 A. Yes.

23 Q. They had never made that accusation before
24 2016 when this lawsuit was filed; is that correct?

25 A. I do not know.

1 Q. Now, Mr. Marwaha -- I'm sorry, Mr. Singhal,
2 he's known Mr. Dietz for a long time, correct?

3 A. I do not know their relationship.

4 Q. You didn't hear that Mr. Dietz and Mr. Singhal
5 were on the RMON -- part of the RMON Working Group
6 together?

7 A. Yes, I did.

8 Q. And that that relationship stretches back to
9 the mid-1990s?

10 A. If that's when the RMON Group was formed,
11 then, yes, that would be accurate.

12 Q. Okay. And for all that time, from the
13 mid-'90s until today, almost 20 years, it wasn't until
14 this lawsuit was filed that somebody decided to accuse
15 Mr. Dietz of lying and cheating?

16 A. I believe it's the case that once we were
17 aware that these -- these patent infringement
18 accusations became -- you know, were applied to
19 NetScout, that it became something reasonable to do.

20 MR. DAVIS: If I could have DX-21,
21 please.

22 Q. (By Mr. Davis) Do you remember seeing this
23 slide in opening statement, sir?

24 A. Vaguely, yes.

25 Q. Okay. And do you see here where at the top it

1 says remote network monitoring MIB protocol identifiers?

2 A. Yes.

3 Q. And the date is November 25, 1996?

4 A. Yes.

5 Q. Now, do you see below here where it says
6 inventor information?

7 A. Yes.

8 Q. Now, this is the document that Mr. Dietz --
9 I'm sorry, Mr. Rosenfeld prepared for Mr. Dietz to take
10 notes about his invention. Do you recall that?

11 A. Yes.

12 Q. Now, do you -- do you recall that in -- in
13 your opening in this case, the top document was
14 juxtaposed to the bottom document in this slide; is that
15 correct?

16 A. Yes.

17 Q. And the inference is that Mr. Dietz
18 invented -- came up with his invention in December of
19 1996, a month after the RMON MIB protocol identifiers
20 document. Do you see that?

21 A. I do.

22 Q. Okay.

23 MR. DAVIS: If we could, please, have
24 DX-517, Page 7.

25 Q. (By Mr. Davis) Now, you remember on Mr.

1 Dietz's direct examination where he testified that he
2 actually didn't come up with the -- he didn't conceive
3 of the invention until January of 1998; do you recall
4 that testimony?

5 A. I don't recall everything that Mr. Dietz said.

6 Q. Okay. Well, Mr. Dietz was shown this very
7 document, and he testified that he, in 1998, developed a
8 new process for the pattern recognition system that
9 would enable the system to run at higher speeds
10 required.

11 Do you see that, sir?

12 A. I do.

13 Q. And do you recall that he testified that the
14 December 1996 date was when he started working on the
15 ideas?

16 A. Again, I don't recall specifically what he
17 said.

18 Q. Now, if Mr. Dietz is going to lie and steal to
19 take credit for something that the RMON Working Group
20 did, why would he do -- tell Mr. Rosenfeld that the
21 first time he started working on it was in 19 --
22 December of 1996, a month after the RMON Working Group
23 published their paper?

24 MR. KRAEUTLER: Objection.

25 THE COURT: State your objection,

1 Counsel.

2 MR. KRAEUTLER: It's -- it's
3 argumentative, and there's no foundation.

4 MR. DAVIS: Your Honor, I don't think I
5 need to have a foundation to ask him a question on cross
6 about his accusations.

7 THE COURT: Just a minute.

8 Well, it calls for the witness to
9 speculate about the mind of Mr. Rosenfeld, and that's
10 improper, and I'm going to sustain the objection on that
11 basis.

12 Let's proceed.

13 Q. (By Mr. Davis) It says here, sir, that Mr.
14 Dietz put in his description to Mr. Rosenfeld that it
15 was not until January of 1998 that he developed this new
16 process; is that correct?

17 A. That's what it says, yes, sir.

18 Q. Doesn't it make more sense that if Mr. Dietz
19 was going to lie and steal from RMON, that he would try
20 to predate the RMON specification?

21 A. I do not know, sir.

22 Q. Now, you're aware, sir, that in a patent
23 infringement case, it's the claims of the patent that
24 the jury is to look to to determine whether a product
25 infringes, are you aware of that, sir?

1 A. I am aware.

2 Q. Were you here during -- well, you were here
3 during opening statement, weren't you, when -- when your
4 attorneys were giving NetScout's position in this case?

5 A. Yes, I was.

6 MR. DAVIS: Could I please have the
7 Tuesday morning transcript, Pages 39 to 40?

8 Q. (By Mr. Davis) Now, this is -- this was the
9 opening statement that was delivered by your lawyers,
10 and it says: In this case, TrackSessions were the
11 ability to identify conversational flows was important
12 to customers who wanted detailed information about the
13 nature of traffic in -- on their data networks. It was
14 important to companies that ran data --

15 MR. DAVIS: Next page, please.

16 Q. (By Mr. Davis) -- networks. It was not
17 important to the telephone companies. They were
18 interested in things like troubleshooting and call
19 tracing. They were interested in whether calls went
20 through.

21 Do you see that, sir?

22 A. I do.

23 Q. And at the bottom of this call-out here, it
24 says: The base product -- products monitor connection
25 flows only. They don't use TrackSessions. They don't

1 do what the patent claims.

2 Now, have you read the claims in this case,
3 sir?

4 A. I have not.

5 Q. Do you know whether the word "TrackSessions"
6 appears in any of the claims of the asserted patents?

7 A. I do not.

8 Q. All right. And you understand, sir, that it
9 is the claims and not the attorney's words that the jury
10 is supposed to apply to the products in this case?

11 A. Yes.

12 Q. So if the claims don't say "TrackSessions,"
13 they're not supposed to look for TrackSessions in the
14 accused products; is that right?

15 A. Can you please repeat that?

16 Q. If the claims don't say "TrackSessions," they
17 don't look to TrackSessions to determine infringement;
18 is that correct?

19 A. I don't know.

20 Q. Okay. Now, the other thing that was said is
21 that --

22 MR. DAVIS: If you can go back -- back to
23 the top of this page.

24 Q. (By Mr. Davis) It says it was not important
25 to the telephone companies. They were interested in

1 things like troubleshooting and call tracing.

2 Now, we do know, sir, that your products, the
3 accused products in this case, are important to
4 telephone companies, aren't they?

5 A. The G10 and GeoBlade are important to the
6 telephone companies, yes.

7 Q. They're very important to telephone companies,
8 aren't they?

9 A. Yes, we like to think that they bring a lot of
10 value to the telephone companies.

11 Q. Now, Mr. Kenedi, is it fair to say that you
12 don't have any respect for Mr. Dietz's patents in this
13 case?

14 A. I don't think that's fair to say. I don't
15 know.

16 Q. Okay. Well, you understand, sir, that you, on
17 behalf of your company, are accusing Mr. Dietz of lying
18 and stealing to get his patents?

19 A. Yes.

20 Q. Okay. Thank you.

21 MR. DAVIS: No further questions, Your
22 Honor.

23 THE COURT: All right. Redirect?

24 MR. KRAEUTLER: Thank you, Your Honor.

25 THE COURT: Are you going to use that

1 demonstrative in your redirect, Counsel?

2 MR. KRAEUTLER: No, why don't we --

3 THE COURT: If you're not, let's take it
4 down.

5 MR. KRAEUTLER: Okay.

6 THE COURT: All right. Now let's proceed
7 with redirect.

8 REDIRECT EXAMINATION

9 BY MR. KRAEUTLER:

10 Q. Mr. Kenedi, is troubleshooting important to
11 telephone companies?

12 A. Yes.

13 Q. Is call tracing important to telephone
14 companies?

15 A. Yes.

16 Q. Is identifying conversational flows important
17 to telephone companies?

18 A. Not that I'm aware of.

19 Q. You were questioned about why you made no
20 accusations about Mr. Dietz before this lawsuit. Had
21 you ever heard of Packet Intelligence before March of
22 2016 when your company was sued?

23 A. No.

24 Q. Had you ever heard of the Dietz portfolio of
25 patents before March 2016 when your company was sued?

1 A. No.

2 MR. KRAEUTLER: No further questions.

3 I'll pass the witness, Your Honor.

4 THE COURT: Is there further
5 cross-examination?

6 MR. DAVIS: Briefly, Your Honor.

7 If I could have PTX-168, Page 1, please.

8 And if you could highlight starting in
9 the section that says Powerful Platform Maximizes
10 Capacity and Flexibility.

11 Q. (By Mr. Davis) Now, if you can read at the
12 top here, sir, do you see where it says: Network
13 traffic volumes are already at an all-time high with
14 more growth on the horizon. At over a billion
15 smartphone users worldwide, your subscribers' insatiable
16 appetites for mobile data will quickly outpace your
17 ability to cost-effectively monitor it - until now?

18 A. I do see that, yes.

19 Q. Is it still your opinion, sir, that the mobile
20 telephone companies and their networks, that your
21 products are not important to them?

22 MR. KRAEUTLER: Objection,
23 mischaracterizes.

24 THE COURT: Overruled. Answer the
25 question, please.

1 A. Can you please repeat that?

2 Q. (By Mr. Davis) Is it still your opinion, sir,
3 after reading your own document that your products are
4 not important to -- to telephone companies?

5 A. I don't recall saying that our products were
6 not important to telephone companies.

7 MR. DAVIS: No further questions, Your
8 Honor.

9 THE COURT: You pass the witness?

10 MR. DAVIS: I pass the witness, Your
11 Honor.

12 THE COURT: Is there further direct,
13 Mr. Kraeutler?

14 MR. KRAEUTLER: No, Your Honor.

15 THE COURT: Okay. Mr. Kenedi, you may
16 step down.

17 THE WITNESS: Thank you.

18 THE COURT: All right. Ladies and
19 gentlemen, I'm advised by the clerk's office that your
20 lunch is here or will be here in the next minute or two.
21 So we're going to use this opportunity to break for our
22 lunch recess. It's a quarter until noon. We will
23 reconvene at 12:30.

24 Please bring your notebooks with you as
25 you exit the courtroom to have lunch in the jury room.

1 I remind you of all my instructions, including not to
2 discuss the case among yourselves. Enjoy your lunch,
3 and we'll be back in 45 minutes to continue.

4 The jury is excused for lunch.

5 COURT SECURITY OFFICER: Rise for the
6 jury.

7 (Jury out.)

8 THE COURT: The Court stands in recess
9 for lunch.

10 COURT SECURITY OFFICER: All rise.

11 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/Shelly Holmes
SHELLY HOLMES, CSR, TCRR
OFFICIAL COURT REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/18

10/11/17
Date